No. 01-400-CFH Title: Ricky Bell, Warden, Petitioner
v.
CAPITAL CASE Gary Bradford Cone

Docketed: Court: United States Court of Appeals for
September 5, 2001 the Sixth Circuit

Entry	Date	Proceedings and Orders
	Aug 30 2001	Petition for writ of certiorari filed. (Response due October 5, 2001)
	Nov 2 2001	Brief of respondent in opposition filed.
	Nov 2 2001	Motion of respondent for leave to proceed in forma pauperis filed.
	Nov 14 2001	DISTRIBUTED for Conference of November 30, 2001
	Dec 3 2001	REDISTRIBUTED for Conference of December 7, 2001
	Dec 10 2001	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Dec 10 2001	Petition GRANTED. SET FOR ARGUMENT March 25, 2002. **********
	Dec 21 2001	Motion of respondent for appointment of counsel by Henry A. Martin filed.
	Jan 10 2002	Motion of respondent for appointment of counsel filed.
	Jan 10 2002	Response of Robert L. Hutton to motion of Henry A. Martin for appointment of counsel.
	Jan 14 2002	DISTRIBUTED. January 18, 2002 (Page 9)
	Jan 15 2002	Order extending time to file petitioner's brief on the merits to and including January 29, 2002. Order extending time to file respondent's brief on the merits to and including March 5, 2002. A reply brief, if any, is due on or before March 18, 2002. All briefs are to be filed with the Clerk and served upon opposing counsel on the extended due dates; Rule 29.2 is suspended.
	Jan 22 2002	Motion for appointment of counsel GRANTED and it is ordered that Robert L. Hutton, Esquire, of Memphis, Tennessee, is appointed to serve as counsel for the respondent in this case.
	Jan 24 2002	Joint appendix filed.
	Jan 29 2002	Brief amicus curiae of United States filed.
	Jan 29 2002	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Jan 29 2002	Brief amici curiae of Ohio, et al. filed.
	Jan 29 2002	Brief of petitioner Ricky Bell, Warden filed.
	Feb 1 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Feb 1 2002	Record filed.
	Feb 11 2002	CIRCULATED.
	Mar 4 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Mar 4 2002	Brief of respondent Gary Bradford Cone filed.
	Mar 5 2002	Brief amici curiae of ACLU, et al. filed.
	Mar 5 2002	Brief amicus curiae of National Association of Criminal

No. 01-400-CFH

Entry	Date	Proceedings and Orders
		Defense Lawyers filed.
	Mar 15 2002	Reply brief of petitioner Ricky Bell, Warden filed.
	Mar 25 2002	ARGUED.

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No. 01-___

In The

Supreme Court of the United States

RICKY BELL, WARDEN,

Petitioner,

v.

GARY BRADFORD CONE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

I.

By applying a *de novo* standard of review to a habeas petitioner's ineffective assistance of counsel claim, does the court of appeals' ruling conflict with *Williams v. Taylor*, 529 U.S. 362 (2000), which set the standard of review under 28 U.S.C. § 2254(d)(1) for granting habeas corpus relief to state prisoners on claims that have been previously adjudicated on the merits in state court?

II.

May a federal court of appeals bypass the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), and presume prejudice under *United States v. Cronic*, 466 U.S. 648 (1984), to find a violation of the Sixth Amendment right to counsel, where defense counsel conducts a thorough pre-trial investigation, presents lay and expert witness testimony in support of a mental health defense at trial, conducts direct and cross examination, and addresses the jury at both the guilt and sentencing phase on behalf of his client, and where the state and district courts have previously determined that the defendant demonstrated no actual prejudice from any deficiencies identified in the attorney's performance?

STATEMENT OF INTERESTED PARTIES

All parties to this case are named in the caption. No party to this petition is a non-governmental corporation requiring a statement as to publicly held ownership interests pursuant to Rule 29.6 of the Rules of this Court.

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PETITION FOR WRIT OF CERTIORARI

The Solicitor General of the State of Tennessee in the Office of the Attorney General, on behalf of Ricky Bell, Warden, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit reversing and remanding this case to the district court with instructions to issue a writ of habeas corpus vacating respondent's two death sentences for first degree murder.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App. 1) is published at 243 F.3d 961. The memorandum opinion of the district court relevant to Cone's ineffective assistance of counsel claim (App. 39) is unreported.

JURISDICTION

The judgment and opinion of the court of appeals were entered on March 22, 2001. (App. 1). Petitioner's timely request for rehearing was denied on June 1, 2001. (App. 12). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2254(d) provides in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

STATEMENT OF THE CASE

I. Procedural History

Respondent Gary Bradford Cone ("respondent" or "Cone") was convicted by a jury in 1982 in the Criminal Court of Shelby County, Tennessee, for the first degree murders of Shipley O. Todd and his wife, Cleopatra Todd, on August 10, 1980, in their home in Memphis, Tennessee. In the same trial, he was also convicted of three charges of assault with intent to commit first degree murder on three other persons and of robbery by use of a deadly weapon upon a fourth. The jury sentenced Cone to death for each of the murders, finding unanimously the following aggravating circumstances: (1) that Cone was previously convicted of one or more felonies, other than the present charge, involving the use or threat of violence to the person; (2) that Cone knowingly created a great risk of death to two or more persons, other than the victim

murdered, during his act of murder; (3) that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (4) that the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another. Tenn. Code Ann. §§ 39-2-203(i)(2), (3), (5), and (6). The Tennessee Supreme Court affirmed the convictions and sentences, *State v. Cone*, 665 S.W.2d 87 (Tenn. 1984) (App. 84),[1] and this Court denied certiorari. *Cone v. Tennessee*, 467 U.S. 1210 (1984).

Cone subsequently filed a petition for post-conviction relief, contending that he received ineffective assistance of counsel at his criminal trial. Following an evidentiary hearing, the Shelby County Criminal Court entered findings of fact and conclusions of law denying relief. The Tennessee Court of Criminal Appeals affirmed the judgment on November 4, 1987. (App. 101). The Tennessee Supreme Court denied Cone's application for permission to appeal, and this Court denied certiorari. *Cone v. Tennessee*, 488 U.S. 871 (1988). Cone filed a second post-conviction petition, but relief was denied, and the dismissal was affirmed on appeal. *Cone v. State*, 927 S.W.2d 579 (Tenn. Crim. App.), *cert. denied*, 519 U.S. 934 (1996).

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[1] The Tennessee Supreme Court found that the aggravating circumstance under Tenn. Code Ann. § 39-2-203(i)(3) (risk of death to two or more persons) was inapplicable to an extended criminal episode, such as the one here. But because the jury clearly found three other aggravators, the Court found that any error with respect to the (i)(3) circumstance was harmless beyond a reasonable doubt. *Cone*, 665 S.W.2d 87. (App. 98).

On July 1, 1997, Cone filed a petition for writ of habeas corpus in the United States District Court for the Western District of Tennessee. On May 15, 1998, the district court entered an order of partial dismissal of Cone's claims, rejecting, *inter alia*, Cone's claim of ineffective assistance of counsel during the sentencing hearing of his trial. (App. 39). On January 29, 1999, the district court dismissed the remainder of Cone's claims.

In a decision filed March 22, 2001, the United States Court of Appeals for the Sixth Circuit reversed and remanded the case to the district court with instructions to issue a writ of habeas corpus vacating Cone's death sentence due to ineffective assistance of counsel at sentencing. (App. 1). The court of appeals denied Warden Ricky Bell's petition for rehearing on June 1, 2001. (App. 112).

II. Facts Relevant to the Petition

1. The proof at Cone's criminal trial and sentencing is accurately summarized in the Tennessee Supreme Court's decision on direct appeal. *State v. Cone*, 665 S.W.2d at 90-92. (App. 85-90).

The murders of Shipley and Cleopatra Todd were the climax of a series of criminal episodes that began on August 9, 1980, when Cone robbed a jewelry store at gunpoint in Memphis, Tennessee. The jewelry store manager gave a description of the suspect to the police, and an officer in an unmarked police car spotted Cone driving his vehicle a short time after the robbery. Cone apparently became alarmed and accelerated in an attempt to escape. A high-speed chase ensued through mid-town

Memphis and into a residential neighborhood, where Cone abandoned his automobile and proceeded on foot. As he fled from police, Cone shot one of the police officers who attempted to arrest him, shot a citizen who challenged him, pulled a gun on a third person and demanded that the latter give Cone his automobile. When the owner of the automobile fled, Cone snapped his pistol several times, but the ammunition in the weapon had been exhausted.

Cone managed to elude police on August 9th, but appeared at the door of a home in the same neighborhood early the next morning and asked to use the phone. When the elderly resident, Lucille Tuech, refused him admittance, Cone drew his pistol on her. Later that same afternoon, Cone broke into the home of Shipley and Cleopatra Todd, who lived a short distance from Ms. Tuech. Mr. Todd was 93 years of age; his wife was 79. The bodies of both victims were found mutilated and cruelly beaten three days later after authorities were alerted by anxious relatives. Both of the victims had been beaten repeatedly about the head until they died. Cone's fingerprints and hair samples were found in the Todds' home, which had been ransacked, and he was apparently able to steal enough money from their home to fly from Memphis to Florida, where he appeared at the home of an acquaintance on August 12.

Although he admitted killing the Todds and committing the other crimes charged, Cone claimed that he was insane, or lacked the requisite mental capacity to commit the offenses, due to drug abuse and stress arising out of his previous military service in Vietnam. On direct

appeal, the Tennessee Supreme Court found that the evidence was "overwhelmingly sufficient to sustain [Cone's] conviction on all charges." *Cone*, 665 S.W.2d at 91. (App. 88).

2. In his first post-conviction petition, Cone contended that his attorney, John Dice, was ineffective at the penalty phase of trial in failing to introduce mitigating evidence and in failing to make a final argument. The state appellate court rejected both contentions. As to the presentation of mitigating evidence, the court found:

> The appellant [Cone] stated that two medical experts who testified for the defense at the guilt phase of the trial should have been reintroduced to testify at the penalty phase as to the appellant's mental state at the time the crimes were committed. He also contends that his mother should have been reintroduced to testify concerning his early childhood.
>
> The trial court accredited the testimony of the defense attorney during which he explained that this evidence had been presented during the guilt stage of the proceeding. Trial counsel was aware that the trial judge would instruct the jury that it could consider mitigating circumstances proved at the guilt stage of the trial. Defense counsel also testified that the appellant's mother did not make a good witness at the guilt stage of the trial and in his judgment, the best tactic was to not subject her to further cross examination.
>
> The appellant complains because defense counsel did not introduce other relatives and associates to testify concerning his early childhood. Defense counsel testified that these potential

> witnesses were interviewed by him and that he concluded that there was a danger that cross examination would elicit additional criminal activity on the part of the appellant. There is nothing in the record to show that the testimony of these witnesses would have benefited the defense. In the absence of this showing, we will not presume that trial counsel erred in not calling them as witnesses.

Cone v. State, Shelby Criminal, No. 79 (Tenn. Crim. App., November 4, 1987), slip op. at 7-8 (App. 108-09).

Addressing the question concerning waiver of closing argument, the court stated:

> One of the prosecuting attorneys made a low-key opening argument after the punishment hearing. It was trial counsel's judgment that he should waive argument to prevent the other prosecuting attorney from making closing argument. The other prosecutor was capable of making very devastating closing arguments and he could not be answered by defense counsel. This is a legitimate trial tactic, the exercise of which furnishes no basis for a finding of ineffective assistance. . . .
>
> The question of what witnesses to use and whether to waive final argument are tactical questions upon which competent lawyers might disagree. It cannot be said that incompetent representation had occurred merely because other lawyers, judging from hindsight, might have made a better or different choice of tactics.

Id., slip op. at 9-10 (App. 110).

Assessing counsel's overall performance, the Tennessee appellate court found:

> Trial counsel made a diligent and thorough investigation of the facts and the law. Although the appellant was without funds, trial counsel was able to procure a defense team composed of himself, a research expert, medical experts, and an investigator. No stone was left unturned in the preparation of the appellant's defense. Trial counsel was very conscientious in representing the appellant and placed much thought and effort into the tactical aspects of this case. However, trial counsel's work and diligence could not remove the overwhelming evidence against the appellant, both on the factual issue and insanity issue. In our view, the findings of guilt and the imposition of the death penalty were based upon the facts and the law – not by shortcomings of counsel.

Id., slip op. at 10 (App. 111).

III. The Opinions Below

1. The district court denied Cone's petition for writ of habeas corpus, finding in pertinent part that Cone failed to demonstrate any prejudice from the failure of his trial counsel to introduce mitigating evidence at sentencing. (App. 79). The court further found that Cone failed to meet § 2254(d)(1)'s threshold requirement that a habeas petitioner demonstrate the state court's rejection of his Sixth Amendment claim "involved an unreasonable application of clearly established Federal law." (App. 80).

As to counsel's waiver of closing argument at sentencing, the district court found that Cone failed to offer

any basis to dispute the state court's determination that the decision was a tactical choice to foreclose rebuttal argument by the prosecution and, further, that the state appellate court's decision on the issue was "a reasonable application of Sixth Amendment standards to the facts presented in the state post-conviction proceedings." (App. 80-81).

2. The court of appeals reversed and remanded the case to the district court with instructions to issue a writ of habeas corpus vacating Cone's death sentences due to ineffective assistance of counsel at sentencing. Contrary to the findings of both the Tennessee appellate courts and the district court, the court of appeals concluded that counsel's decision not to present evidence at sentencing and to make no final argument amounted to constitutional ineffectiveness. *Cone v. Bell*, 243 F.3d 961, 979 (6th Cir. 2001) (App. 37). As to the failure to present evidence at the sentencing stage, the court of appeals offered virtually no explanation to support its disregard of the findings of the Tennessee state courts, merely stating, "counsel had plenty of mitigating evidence at his fingertips." *Id.*, 243 F.3d at 978 (App. 35). Further, the court of appeals rejected the Tennessee courts' conclusion that counsel's decision to waive final argument was a legitimate tactical decision, concluding instead that the explanation given by Cone's counsel for waiving closing argument was "totally unreasonable." *Id.*, 243 F.3d at 978 (App. 36). Epitomizing the hindsight judgment condemned by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984), the court of appeals stated:

We reject out of hand, the argument that a competent attorney would determine that not presenting mitigating evidence of any kind and not making a final argument in a death penalty case is a justifiable "strategy" because doing so might trigger a "devastating" response by the prosecutor – the sole reason assigned by the Tennessee courts for excusing counsel's silence. How much worse off could Cone have been if he were sentenced to death after a "devastating" argument by the prosecutor than if he were sentenced to death after the prosecutor's "mild" request that he be sentenced to death, which was followed by his own attorney's silence? Or, asked differently: How much more devastating for the petitioner could the prosecutor's "devastating" argument have been than the death sentence the petitioner got without such argument?

Cone, 243 F.3d at 978 (App. 35-36).

The court of appeals then determined that Cone need not show actual prejudice under the second prong of *Strickland*, because a presumption of prejudice under *United States v. Cronic*, 466 U.S. 648 (1984), was raised by counsel's behavior. *Cone*, 243 F.3d at 978 (App. 37). The court reasoned that the prosecutor's insistence at the sentencing phase that Cone be put to death had not been subjected to "meaningful adversarial testing" and that counsel had "abandoned" Cone at a critical stage of his trial. *Id.* (App. 37)

In sum, rather than conducting an analysis under *Strickland v. Washington, supra*, the court of appeals simply concluded that the failure to present evidence at a capital sentencing proceeding, combined with counsel's

waiver of closing argument, constitutes a *per se* Sixth Amendment violation under *United States v. Cronic, supra.*

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISION IN *WILLIAMS V. TAYLOR* BY APPLYING A *DE NOVO* STANDARD OF REVIEW TO RESPONDENT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), expressly restricting the power of federal courts to grant writs of habeas corpus to state prisoners. Under pre-AEDPA habeas law, federal courts reviewed "mixed" constitutional questions (*i.e.*, those involving application of constitutional law to facts) *de novo* with a presumption of correctness as to factual findings by the state courts. *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Townsend v. Sain*, 372 U.S. 293 (1963). The AEDPA substantially changed the role of the federal judiciary in reviewing habeas petitions, in particular, limiting the authority to grant the writ even where the federal court concludes in its independent judgment that the decision of the state court was incorrect. As this Court explained in *Williams v. Taylor*, 529 U.S. 362 (2000), under the AEDPA, a federal court's inquiry is limited to the *reasonableness* of the state court's application of clearly established federal law. *Id.*, 529 U.S. at 412.

Here, contrary to this Court's decision in *Williams*, the court of appeals reviewed respondent's ineffective

assistance of counsel claim *de novo*, plainly stating at the outset of its analysis, "A claim of ineffective assistance of counsel presents mixed questions of law and fact which this court reviews *de novo*." *Cone*, 243 F.3d at 975 (App. 30-31). In support of that proposition, the court of appeals relied not on the authority of this Court, but on a Sixth Circuit decision[2] in an appeal from a federal resentencing proceeding.[3] Applying that erroneous standard, the court of appeals wholly disregarded the findings and conclusions of the Tennessee state courts with respect to respondent's ineffective assistance of counsel claim and, essentially, substituted its judgment in the place of the state court in direct contravention of 28 U.S.C. § 2254(d)(1), as interpreted by this Court in *Williams v. Taylor, supra*.

Under the AEDPA, the standard for granting habeas relief with respect to claims that have been previously adjudicated on the merits in state court is a narrow one set forth in 28 U.S.C. § 2254(d), which provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of,

---

[2] *United States v. Jackson*, 181 F.3d 740, 744 (6th Cir. 1999).

[3] In fact, the lower court's opinion does not even cite *Williams v. Taylor* – currently this Court's definitive statement on the standard of review under 28 U.S.C. § 2254(d).

> clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In *Williams*, this Court resolved a dispute among the federal appellate courts regarding the proper interpretation of § 2254(d)(1) and articulated the appropriate standard of review as follows:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 412.

Williams made clear that the AEDPA removed the authority of the federal judiciary to grant habeas relief based upon its independent judgment that a state court erred on a question of constitutional law or a mixed constitutional question, focusing instead on the reasonableness of the state court's determination in light of Supreme Court authority. Most important, according to *Williams*, and indeed the fundamental difference between § 2254(d) and pre-AEDPA review, is that "an *unreasonable* application of federal law [by a state court] is different

from an *incorrect* application of federal law." *Williams*, 529 U.S. at 512 (emphasis added). The Court further instructed that the phrase "clearly established Federal law, as determined by the Supreme Court of the United States," contained in § 2254(d)(1), refers to holdings, as opposed to *dicta*, of this Court's decisions as of the time of the relevant state court decision. *Williams*, 529 U.S. at 412. The analysis of the court of appeals in this case violated both instructions.

First, after engaging in an independent evaluation of trial counsel's testimony at the state post-conviction hearing, the court of appeals discounted what it described as mere "post hoc justifications" for actions taken at trial, finding that counsel's explanations were "totally unreasonable." *Cone*, 243 F.3d at 978. (App. 34-36). With that assessment, the court concluded that counsel's performance was deficient under the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984), due to the failure to present mitigation evidence during the sentencing phase of trial and in the decision to waive closing argument at the conclusion of the sentencing phase. The appellate court did so fully realizing that the Tennessee courts had previously reached an opposite conclusion based upon the same testimony. Then, despite the absence of any evidence of prejudice and an express finding to the contrary by the Tennessee state courts, the court of appeals bypassed the second prong of *Strickland* and ruled that under *United States v. Cronic*, 466 U.S. 648 (1984), a presumption of prejudice was raised by counsel's performance. (App. 37).

In contrast, the Tennessee Court of Criminal Appeals previously found that counsel made a series of reasoned

tactical decisions regarding presentation of mitigation proof at the sentencing phase of trial. (App. 108-10). The state court credited counsel's testimony at the post-conviction hearing that he determined not to present additional evidence during sentencing because it had already been presented during the guilt phase and could be considered by the jury for sentencing purposes. (App. 108). In addition, counsel determined that Cone's mother, who testified during the guilt stage, had not been a good witness, and he made a tactical decision not to subject her to further cross-examination. (App. 109). Although Cone complained in state court that defense counsel was ineffective for failing to introduce other relatives and associates to testify about his childhood, the Tennessee court found that he failed to demonstrate how the testimony would have benefited him and correctly refused to presume prejudice absent such proof. (App. 109).

With regard to counsel's decision to waive final argument at sentencing, the state court found:

> One of the prosecuting attorneys made a low-key opening argument after the punishment hearing. It was trial counsel's judgment that he should waive argument to prevent the other prosecuting attorney from making closing argument. The other prosecutor was capable of making very devastating closing arguments and he could not be answered by defense counsel. This is a legitimate trial tactic, the exercise of which furnishes no basis for a finding of ineffective assistance.

(App. 110).

In sum, the Tennessee Court of Criminal Appeals found that defense counsel made a diligent and thorough investigation of the facts and the law, was conscientious in representing the respondent, and placed much thought into the tactical aspects of this case. The court further found that counsel's diligence "could not remove the overwhelming evidence against the defendant, [and] the findings of guilt and the imposition of the death penalty were based upon the facts and the law – not by shortcomings of counsel." (App. 111). In reaching its decision, the state court identified and applied as controlling legal authority the standard set forth in *Strickland v. Washington, supra.* (App. 107).

Given this Court's decision in *Darden v. Wainwright*, 477 U.S. 168 (1984), the state court's decision could in no way be deemed unreasonable. In *Darden*, this Court deferred to defense counsel's decision not to introduce mitigating evidence at a capital sentencing hearing where defense counsel had engaged in extensive pre-trial preparation, including obtaining a psychiatric report on the defendant with an eye toward mitigation, but for tactical reasons decided not to introduce that evidence at trial. *Id.*, 477 U.S. at 185-87. The Court concluded that the petitioner failed to overcome the strong presumption that the challenged action "might be considered sound trial strategy." *Id.*, 477 U.S. at 186-87. Counsel's performance in Cone's case was far stronger in that mitigating evidence was actually presented during the guilt phase of trial. In *Darden*, the evidence was not presented at all. *Id.*, 477 U.S. at 184-86.

But rather than assessing the reasonableness of the state court's application of *Strickland* to the evidence

before it, as required under *Williams v. Taylor*, the court of appeals reviewed the issue of ineffective assistance of counsel *de novo*, including an apparent re-assessment of the credibility of defense counsel's testimony at the post-conviction hearing, 243 F.3d at 977-78 (App. 34-35), reached an independent determination of the "correct" outcome, and essentially overruled the state court – a result not only contrary to the letter and spirit of the AEDPA, but to the express holding of this Court in *Williams*.

Further, the lower court's reliance on *dicta* in *United States v. Cronic*, 466 U.S. 648 (1984), for the proposition that prejudice must be presumed in this case, directly conflicts with this Court's ruling in *Williams*, is inconsistent with the standard for determining whether a defendant has received constitutionally effective assistance of counsel as set forth in *Strickland v. Washington, supra*, and wholly disregards express findings to the contrary by the Tennessee state courts.

Although the court of appeals paid lip service to the AEDPA by quoting the pertinent statutory provision in the final paragraph of its opinion, it is clear from the opinion below that the court did precisely what it stated in the introduction to the ineffective assistance of counsel claim – it reviewed the mixed constitutional question before it *de novo*.[4] *Cone*, 243 F.3d at 975. (App. 30-31). The

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[4] Indeed, but for the lower appellate court's perfunctory reference to § 2254(d)(1), its mode of analysis of Cone's ineffective assistance claim is indistinguishable from that employed in pre-AEDPA cases.

court of appeals' opinion on this important federal question directly conflicts with the decision of this Court in *Williams v. Taylor, supra*, and certiorari is warranted under Supreme Court Rule 10(c).

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE SPLIT AMONG THE CIRCUITS CONCERNING WHETHER PREJUDICE MAY BE "PRESUMED" UNDER *UNITED STATES V. CRONIC* FROM THE DEFICIENT PERFORMANCE OF COUNSEL WHO ACTIVELY DEFENDED THE ACCUSED AT TRIAL.

The Sixth Amendment to the United States Constitution provides, in relevant part, that, in all criminal prosecutions, the accused shall . . . "have the Assistance of Counsel for his defence." This Court has specified that the right to counsel means the right to "effective assistance of counsel." *See Powell v. Alabama*, 287 U.S. 45 (1932). Until *Strickland v. Washington*, 466 U.S. 668 (1984), the lower courts were in "disarray" concerning how to evaluate claims of ineffective assistance of counsel. *See United States v. DeCoster*, 624 F.2d 196, 204 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 944 (1979). In *Strickland*, this Court established a two-prong test to be applied to claims of ineffective assistance of counsel. First, a defendant must show deficient performance by counsel and, second, that counsel's deficient performance prejudiced the defense and deprived the defendant of a fair trial. *Strickland*, 466 U.S. at 687.

On the same day the watershed *Strickland* opinion was issued, this Court also decided another Sixth Amendment case – *United States v. Cronic*, 466 U.S. 648 (1984).

Dicta in *Cronic* suggested that, in rare circumstances, the assistance of counsel might be so lacking that reviewing courts may presume prejudice to the accused, without inquiry into the actual impact of counsel's performance on the outcome of trial. *Cronic*, 466 U.S. at 662. The lower courts are now in "disarray" concerning when the *Cronic dicta* may be applied to dispense with *Strickland's* prejudice prong.

Of course, in *Cronic* itself, this Court refused to apply the presumption of prejudice. Although the circumstances regarding the late appointment of a young, inexperienced attorney outside his area of practice were not ideal, this Court found no basis for presuming prejudice because there was not a complete denial of counsel, or circumstances amounting to a breakdown in the adversarial system. *Cronic*, 466 U.S. at 662. Attempting to illustrate the types of circumstances that might justify applying a presumption of prejudice, this Court referred to situations, in other contexts not involving allegations of ineffective assistance of counsel, that had been adjudged so likely to prejudice the accused that the cost of litigating their effect in a particular case was unjustified. *Cronic*, 466 U.S. at 658 n. 24. For example, this Court has presumed prejudice in cases involving the pervasive influence of the news media, where the proceedings were "entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob." *Murphy v. Florida*, 421 U.S. 794, 801 (1975); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Estes v. Texas*, 381 U.S. 532 (1965); *Sheppard v. Maxwell*, 384 U.S. 333 (1966). This Court has also presumed prejudice where an involuntary

confession has been introduced into evidence, or where a co-defendant's statement inculpating the defendant has been improperly introduced into evidence. *Payne v. Arkansas*, 356 U.S. 560 (1958); *Jackson v. Denno*, 378 U.S. 368 (1964); *Bruton v. United States*, 391 U.S. 123 (1968).

There are some situations involving the right to counsel that are so clearly analogous to those listed as examples in footnote 24 of *Cronic* that there is no question but that *Cronic's* presumption of prejudice should apply. As this Court pointed out in *Cronic*, the most obvious situation for applying the presumption of prejudice in the Sixth Amendment context is where there has been a complete denial of counsel. *Cronic*, 466 U.S. at 659. But the Court also suggested in *Cronic* that prejudice may be presumed when there has been a "constructive" denial of counsel. The lower courts are now split concerning the types of circumstances that may give rise to a "constructive" denial of the effective assistance of counsel, and this Court's guidance is needed to resolve the issue.

Courts have found constructive denial of counsel in three basic contexts. The clearest cases are those where counsel has been inactive, essentially amounting to providing no defense at all, or where counsel has been absent during critical portions of the trial. For example, in *Martin v. Rose*, 744 F.2d 1245 (6th Cir. 1984), the court found constructive denial where the attorney chose to sit mute throughout his client's trial. After the attorney's motion for continuance was denied, his strategy was to sit quietly throughout the trial and then to rely on his pre-trial objections for appeal after his client was convicted. The court found the petitioner did not need to show prejudice since his attorney's refusal to participate

in the trial resulted in there being no adversarial testing of the prosecution's case whatsoever. *Martin*, 744 F.2d at 1250. Similarly, the court found constructive denial of counsel in *Tippins v. Walker*, 77 F.3d 682 (2nd Cir. 1996), where counsel slept for extended periods throughout the trial. As a final example in this category, in *Green v. Arn*, 809 F.2d 1257 (6th Cir. 1987), *vacated on other grounds*, 484 U.S. 806 (1987), the court found constructive denial of counsel where the defendant's lawyer was absent during the cross-examination of a critical government witness by a co-defendant's attorney. In each of these cases, competent counsel was appointed, but the attorneys either took no steps whatsoever to represent their clients, or failed at critical junctures to serve the interest of their clients.

The second category of constructive denial cases are those in which courts have found structural impediments to the effective assistance of counsel. In *Cronic*, 466 U.S. at 662 n. 32, this Court noted that it had presumed prejudice when counsel labored under an actual conflict of interest. As a similar example of a structural impediment, this Court referred to *Powell v. Alabama*, 287 U.S. 45 (1932), where an out-of-state lawyer was appointed only six days before a complex capital case. In *Powell*, this Court did not examine the actual performance of counsel at trial, but instead concluded that under the circumstances, the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair. *Cronic*, 466 U.S. at 660.

Some lower courts have also created a third category of cases where they have applied the *Cronic* presumption, despite the fact that the accused was represented by a lawyer, and the lawyer actively participated in the case.

Other federal courts, however, have rejected this expansive view of the *Cronic dicta*, holding that prejudice should never be presumed in cases such as this one, where the thrust of the defendant's Sixth Amendment claim focuses on specific deficiencies in defense counsel's actual performance whose effect on the outcome of the trial can be readily ascertained.

For example, in *Scarpa v. Dubois*, 38 F.3d 1 (1st Cir. 1994), *cert. denied*, 513 U.S. 1129 (1995), the First Circuit refused to affirm the district court's expansive application of *Cronic*. In that case, the district court had granted relief because the attorney's trial strategy was based on a misunderstanding of the elements of the crime charged. The circuit court, although acknowledging that the defense had been inadequate, found *Cronic* inapplicable since the attorney was present and participated throughout the trial. The court held that a *Strickland* analysis should be applied in such circumstances.

Similarly, the Fifth Circuit has declined to allow *Cronic* to be "stretched to encompass" the failure of an attorney to conduct an investigation into two of three armed robberies with which his client was charged. *Woodward v. Collins*, 898 F.2d 1027, 1028 (5th Cir. 1990). *See also Toomey v. Bunnell*, 898 F.2d 741, 744 n. 2 (9th Cir. 1990), *cert. denied*, 498 U.S. 960 (1990) (majority declined to apply *Cronic* where attorney "actively participated" at trial, noting that "[w]e have applied the *Cronic* exception very sparingly.").

On the other hand, other circuits have stretched the *Cronic dicta* to apply to such facts. The Ninth Circuit, despite adopting a narrow view in *Toomey, supra*, applied

an expansive interpretation in *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991). There, the attorney failed to call any witnesses and conceded in closing argument that there was no reasonable doubt as to the factual issues presented at trial.[5] In *Osborne v. Shillinger*, 861 F.2d 612 (10th Cir. 1988), the Tenth Circuit applied *Cronic* where the defendant's attorney refused to pursue any non-statutory mitigating circumstances and argued that his client's actions were atrocious.[6]

Clearly, the circuits are in disarray concerning whether a court may apply the *Cronic dicta* to find a "constructive" violation of the Sixth Amendment in cases where counsel has been neither absent nor inactive, but merely inept, and where there was no structural impediment that prevented counsel's effective functioning. Bad lawyering, no matter how bad, does not justify invoking the *per se* presumption of prejudice under *Cronic*. Rather, the *Strickland* analysis is fully competent to vindicate the accused's Sixth Amendment right to counsel in such cases.

Here, Cone's counsel thoroughly investigated the law and facts of his case. As the Tennessee Court of Criminal Appeals observed, "[a]lthough appellant was without funds, trial counsel was able to procure a defense team composed of himself, a research expert, medical experts,

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[5] The Fifth Circuit explicitly disagreed with the Ninth Circuit's application of *Cronic* to the facts presented in *Swanson*. *Childress v. Johnson*, 103 F.3d 1221, 1229 (5th Cir. 1997).

[6] The First Circuit explicitly disagreed with the Tenth Circuit's application of *Cronic* to these facts. *Scarpa v. Dubois, supra*, 38 F.3d at 12.

and an investigator. No stone was left unturned in the preparation of [Cone's] defense." (App. 111). Counsel's opening statement at trial outlined a clear theory of defense, which was reiterated throughout the trial proceedings – that Cone was damaged psychologically and physically (in the form of drug addiction) as a result of service to his country in Vietnam, and that his actions in this case were directly attributable to that damage. He called lay and expert witnesses to support that theory during the guilt phase and actively cross-examined the State's witnesses in both the guilt and sentencing phases of trial. The Tennessee Supreme Court's opinion on direct appeal from Cone's conviction and sentence highlights significant aspects of Cone's proof presented in the guilt phase, including two mental health experts, as well as pertinent information about Cone's background. *State v. Cone*, 665 S.W.2d 87, 91-92 (Tenn. 1984). (App. 89-90). At the beginning of the sentencing phase, defense counsel explained to the jury that the defense would rely in mitigation on proof presented during the guilt phase, as he was entitled to do under Tenn. Code Ann. § 39-2-203(e),[7] argued in support of a number of statutory and non-statutory mitigating circumstances, and asked the jury for mercy on behalf of his client. (App. 114-17).

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[7] Tenn. Code Ann. § 39-2-203(e) (1982) provides in pertinent part: "After closing arguments in the sentencing hearing, the trial judge shall include in his instructions for the jury to weigh and consider any mitigating circumstances and any statutory aggravating circumstances set forth in subsection (i) of this section which may be raised by the evidence at either the guilt or sentencing hearing, or both."

Counsel was neither absent nor inactive, and he was not precluded from rendering effective assistance by any structural impediment – circumstances that might justify application of the *Cronic* presumption because their impact on the outcome of the trial cannot be accurately measured. Rather, the quality and effect of the lawyering afforded Cone is fully capable of assessment under *Strickland*. And both the Tennessee courts and the district court found that Cone received constitutionally effective assistance of counsel under that standard.

The court of appeals failed even to address the prejudice prong under *Strickland*, proceeding directly to a presumption of prejudice under *Cronic*. The court's presumption of prejudice in this case obfuscates the entire rationale of *Cronic* and ignores the clear dictates of *Strickland*. As this Court pointed out in *Cronic*, "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Cronic*, 466 U.S. at 658.

Further, the court of appeals' unnecessarily expansive reading of *Cronic* in this case not only ignores the dictates of *Strickland*, but frustrates the substantial interests of comity, federalism and the finality of judgments. In *Engle v. Isaac*, 456 U.S. 107, 128 (1982), this Court observed that "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."

There is a conflict among the circuits concerning the circumstances under which prejudice may be presumed

under *Cronic* to find a Sixth Amendment violation. The lower courts need guidance as to the parameters and proper application of the *Cronic dicta*, and certiorari is warranted under Supreme Court Rule 10(a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GARY BRADFORD CONE, *Petitioner-Appellant,* *v.* RICKY BELL, Warden, Riverbend Maximum Security Institution, *Respondent-Appellee.*	))))))))	No. 99-5279

Appeal from the United States District Court
for the Western District of Tennessee at Memphis
No. 97-02312 – Jon Phipps McCalla, District Judge.

Argued: September 12, 2000

Decided and Filed: March 22, 2001

Before: MERRITT, RYAN, and NORRIS, Circuit Judges.

COUNSEL

ARGUED: Paul R. Bottei, FEDERAL PUBLIC DEFENDER'S OFFICE, Nashville, Tennessee, for Appellant. Jennifer L. Smith, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellee. **ON BRIEF:** Robert L. Hutton,

GLANKLER & BROWN, Memphis, Tennessee, for Appellant. Tonya G. Miner, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellee.

OPINION

RYAN, Circuit Judge. Gary Bradford Cone was convicted in a Tennessee state court on two counts of first degree murder, two counts of murder in the perpetration of a burglary, three counts of assault with intent to commit murder, and one count of robbery by use of deadly force. He was sentenced to death. His appeal to the Tennessee Supreme Court and two post-conviction petitions for relief were unsuccessful. He then filed a petition for a writ of *habeas corpus* in the federal district court, and it was denied. This court issued a certificate of appealability.

We now affirm the denial of Cone's petition with regard to the offenses of conviction but grant his petition with respect to the death sentence because, in the sentencing phase of his trial, Cone was denied the effective assistance of counsel guaranteed him by the Sixth Amendment to the United States Constitution.

I.

Facts

The crime spree that culminated in Cone's conviction and sentence to death began on August 9, 1980, when he

robbed a jewelry store in Memphis, Tennessee, of approximately $112,000 worth of goods. The police were alerted and they promptly spotted Cone driving a car. A high speed chase ensued, following which Cone abandoned the car in a residential neighborhood, shot pursuing police officer B.C. Allen and citizen John Douglas Clark, and unsuccessfully tried to shoot a third citizen, Herschel Dalton when Dalton refused to surrender his car to Cone. Cone temporarily eluded the police, but they seized his car and in it found a large amount of cash, drugs, and the stolen jewelry.

The next day, Cone appeared in the same residential neighborhood at the home of Lucille Tuech. He drew a gun on Tuech when she refused to let him in to make a phone call. Later the same day, Cone broke into the home of an elderly couple, Shipley and Cleopatra Todd, who were 93 and 79 years old, respectively. Cone tried to convince the couple to help him, but when they refused to cooperate, he brutally killed them. Three days later, the Todds' severely beaten and mutilated bodies were found in their home. Cone's fingerprints and hair samples were also found in the home. In due course, Cone was arrested in Florida and returned to Tennessee.

II.

State Court Trial Proceedings

Cone's jury trial was held in Shelby County Criminal Court beginning on April 14, 1982. It concluded with a jury verdict that found him guilty of: (1) two counts each of first degree murder and murder in the perpetration of a burglary involving the Todds; (2) assault with intent to

commit murder in the first degree against Officer Allen, Clark, and Dalton; and (3) robbery with a deadly weapon, of the jewelry store clerk. Cone was sentenced to 10 to 25 years in prison on the assaults, life imprisonment on the robbery, and death on the two murder charges. He appealed as of right to the Tennessee Supreme Court, which affirmed the conviction and sentence.

A.

State Court Collateral Proceedings – First Petition

On June 22, 1984, Cone filed his first state post-conviction petition, attacking his conviction and death sentence. He alleged that his rights had been violated under the First, Fourth, Fifth, Sixth, Eight [sic], Ninth, and Fourteenth Amendments to the United States Constitution, and particularly, that he had been denied the effective assistance of counsel at trial. On November 21, 1984, Cone filed an amended post-conviction petition, claiming that his prosecutors had engaged in misconduct and alleging additional instances of ineffective assistance of counsel. The state trial court held a hearing and denied Cone's petition.

Cone appealed that denial to the Tennessee Court of Criminal Appeals, and on November 4, 1987, that court affirmed.

On December 21, 1987, Cone sought permission to appeal to the Tennessee Supreme Court, raising only claims of prosecutorial misconduct and ineffective assistance of counsel, but his petition was denied.

B.

State Court Collateral Proceedings – Second Petition

On June 15, 1989, Cone, acting *pro se*, filed a second state post-conviction petition, and on June 22, 1989, an amended petition. The trial court dismissed the amended petition as barred by the successive petition restrictions of Tennessee's post-conviction statute. Tenn. Code Ann. § 40-30-112 (1990) (since repealed). Cone appealed, and on May 15, 1991, the Court of Criminal Appeals reversed and remanded the amended petition to the trial court to allow Cone to "rebut the presumption of waiver." A presumption of waiver arises under Tennessee law if a claim for relief is not asserted before a court of competent jurisdiction in which the claim could have been presented. Tenn. Code Ann. § 40-30-112 (1990) (since repealed). On August 13, 1993 and October 5, 1993, Cone's post-conviction counsel filed second and third amended petitions, alleging more ineffective assistance of counsel claims. Finally, on November 12, 1993, counsel filed a fourth amended petition.

The trial court, on remand, dismissed the amended petitions under Tenn. Code Ann. § 40-30-112(b), holding that all the grounds raised were barred because they had previously been determined or were waived. This judgment was affirmed by the Tennessee Court of Criminal Appeals, and the Tennessee Supreme Court denied an application for permission to appeal.

Cone filed a motion for a rehearing, but it too was denied by the Tennessee Supreme Court. The United States Supreme Court denied Cone's petition for a writ of *certiorari*.

III.

Federal Court *Habeas* Petition

Cone then filed a motion in federal district court to stay his execution; the court granted the stay and permitted the filing of a *habeas* petition under 28 U.S.C. § 2254. On July 1, 1997, Cone filed a petition for a writ of *habeas corpus* in federal district court. On October 14, 1997, Cone filed motions for an evidentiary hearing and for discovery, but they were denied. The district court also denied the section 2254 petition, and further, denied a certificate of appealability, finding that an appeal would not be taken in good faith. The court also lifted the stay of execution, however, a new execution date was not set. This court then granted Cone's motion for a certificate of appealability.

We review *de novo* the district court's disposition of a petition for *habeas corpus*, but we review the district court's factual findings for clear error. *Carter v. Bell*, 218 F.3d 581, 590 (6th Cir. 2000).

IV.

Federal *Habeas* and Tennessee Waiver

Before addressing the substance of Cone's several constitutional claims, it might be useful to review the basis for this federal court's authority to examine the validity of a state court conviction.

A federal court may grant relief on a petition for a writ of *habeas corpus* only if the applicant has exhausted the remedies available in the state court. 28 U.S.C.

§ 2254(b)(1)(A) (West Supp. 2000). If the state court adjudicates and rejects a claim on adequate and independent state grounds, such as a state procedural rule that precludes adjudicating the claim on the merits, the petitioner is barred by this procedural default from seeking federal *habeas* review of such claim, unless the petitioner can show "cause and prejudice" for the default. *Coleman v. Thompson*, 501 U.S. 722, 750-51 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977).

However, there are several prerequisites before the cause and prejudice test is applied in a federal court to any kind of state procedural default. "First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule." *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). "Second, the court must decide whether the state courts actually enforced the state procedural sanction." *Id.* Third, the procedural default must be an "independent and adequate" state ground on which the state can rely to foreclose review of a federal constitutional claim. *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 148 (1979). If these three prerequisites are met, a federal court must determine whether the petitioner is able to meet the cause and prejudice test to excuse the state procedural default.

The cause and prejudice standard is a two-part test in which the petitioner must: (1) present a substantial reason to excuse the default, *Coleman*, 501 U.S. at 754; and (2) show that he was actually prejudiced as a result of the claimed constitutional error, *United States v. Frady*, 456 U.S. 152, 167-69 (1982).

If the claims presented in the federal court were never actually presented in the state courts, but a state procedural rule now prohibits the state court from considering them, the claims are considered exhausted, but are procedurally barred. *Coleman*, 501 U.S. at 752-53.

Under Tennessee law at the time of Cone's conviction, grounds for relief that had been previously determined or waived were not cognizable in a state post-conviction action. Tenn. Code Ann. § 40-30-111 (1990) (since repealed). Moreover:

> (a) A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.
>
> (b)(1) A ground for relief is "waived" if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.
>
> (2) There is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived.

Tenn. Code Ann. § 40-30-112 (1990) (since repealed).

A federal court will not grant *habeas corpus* relief unless the state adjudication of the federal claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (West Supp. 2000).

V.

The *Brady* Claim

The first of Cone's claims before us is his assertion that the state prosecutors withheld exculpatory documentary evidence from him in violation of the rule announced in *Brady v. Maryland*, 373 U.S. 83 (1963). The *Brady* rule requires the government "to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987). A *Brady* violation is grounds for setting aside a conviction or sentence only if the failure to declare the relevant material "undermines confidence in the verdict, because there is a reasonable probability that there would have been a different result had the evidence been disclosed." *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998), *cert. denied*, 528 U.S. 842 (1999).

The respondent argues that this claim has been procedurally defaulted under Tennessee law and therefore may not be entertained here. Cone argues that he has not procedurally defaulted his *Brady* claims because he was unable to raise the claims in his first and second petitions for post-conviction relief because he did not then know the alleged *Brady* material existed. He also argues he has "cause" for any procedural default because some of the allegedly withheld documents were only recently available to him through discovery in 1997. He then proceeds to argue the merits of his *Brady* claim. Although it is a difficult question, we believe that Cone's claims are procedurally defaulted and that he cannot show cause and prejudice to overcome the default. And even if that were

not so, we are satisfied that the documents Cone complains were withheld are not *Brady* material.

A.

Cone claims the documents that were withheld by the state prosecutors fall into four groups: (1) evidence regarding his drug use; (2) evidence that might have been useful to impeach the testimony and credibility of Officer Ralph Roby; (3) FBI reports; and (4) evidence showing that the prosecution's witness, Ilene Blankman, was untruthful and biased. We will take up each category of documents separately and then discuss whether they are *Brady* material at all.

1.

First, Cone claims that the prosecution withheld several witnesses' statements which indicate that the prosecution knew about Cone's drug use. These include: a statement by Robert McKinney, who stated he was present at the time of the robbery, and that Cone "acted real weird" and appeared to be on drugs; statements from Charles and Debbie Slaughter that Cone "looked wild eyed" the day before the killings; a statement by Sergeant Grieco of the Pompano Beach, Florida, Police Department who described Cone as looking "frenzied" and "agitated" a few days after the killings; and a statement from Chief Daniels of the Lake Village, Arkansas, Police Department who informed authorities that Cone "was a heavy drug user."

Cone claims that his "amphetamine psychosis" defense – essentially an insanity defense – was undercut because the prosecution withheld these documents from his examination. Each of the statements was part of the state District Attorney's files, except for Chief Daniels's statement. It is difficult to discern from the record whether Chief Daniels's statement was for certain in the DA's files, nevertheless, it appears to be part of it. However, in his petition for a writ of *habeas corpus*, Cone admits Chief Daniels's statement was indeed part of the DA's files and that he had access to the files in 1992. Cone claims to have been unaware of their existence until 1992. Whatever the date of his discovery of the existence of these documents, it is clear that Cone learned of these materials well before his second and third amended petitions were filed on August 13 and October 5, 1993, respectively.

A careful examination of the state court proceedings reveals that before filing his petition for a writ of *habeas corpus* in the federal court on July 1, 1997, Cone three times raised a generalized claim in the state courts that the prosecution had withheld evidence. He raised the issue for the first time in his *pro se* amended petition for post-conviction review, dated June 1989, wherein he claimed that the prosecution had been withholding evidence. The Tennessee criminal court determined that the claim had been waived by failing to raise it in his direct appeal. This determination was affirmed on appeal. Cone raised the issue again in his second amended petition for post-conviction relief in August 1993, and this time claimed somewhat more specifically, that the prosecution had withheld evidence regarding Ilene Blankman. Finally,

Cone raised the issue in his third amended petition for post-conviction relief in October 1993; this time his claim was that the state withheld exculpatory evidence that it knew of Cone's drug problem. This evidence, he claimed, included the statements by Charles and Debbie Slaughter, among others. The August 13, 1993 and October 5, 1993, amended petitions were dismissed by the trial court, which found that the claims had been previously determined or waived. This was affirmed on appeal. *Cone v. State*, 927 S.W.2d 579 (Tenn. Crim. App. 1995).

Although Cone is correct in his argument that he in fact raised in the state court this first of his four *Brady* claims – that the prosecution withheld evidence that the state knew of his drug use – and therefore, that this claim was exhausted, we may not review a claim that has been decided in the state court on an "independent and adequate" state ground, as was the case here. The independent and adequate state ground in this instance is the state court's finding that Cone's claims were previously determined or waived under Tenn. Code Ann. § 40-30-112 (1990) (since repealed). Thus, this first of Cone's four-part *Brady* claim is procedurally defaulted.

In addition, even if Chief Daniels's statement were not part of the DA's files, and Cone did not have access to it, it is not *Brady* material. The statement that Cone "was a heavy drug user" does not undermine our confidence in the verdict such that a reasonable probability exists that the verdict would have been different, because of the overwhelming evidence of Cone's guilt.

2.

The second of Cone's *Brady* claims is that the prosecution withheld evidence that Cone might have used to impeach the credibility of Officer Roby. According to Cone's interpretation of Officer Roby's testimony, the officer testified that there was no evidence that Cone had used drugs. According to Cone, the documents withheld from him included an All Points Bulletin sent out by Officer Roby, in which Roby warns the nation that Cone is not only a "drug user," but a "heavy drug user," and evidence that Cone's sister told Officer Roby that Cone had a "severe psychological problem" and "needed to work on his drug problem." Cone claims these two pieces of evidence show the falsity of Officer Roby's testimony that Cone was not a drug user. These two items of evidence were indeed part of the state DA's files and arguably fall within Cone's claim that the state withheld exculpatory evidence regarding his drug use, a claim he raised in his third amended petition for post-conviction relief.

The state court ruled that the claim had been previously determined or waived by Cone's failure to raise it earlier. This determination was affirmed on appeal. *Cone*, 927 S.W.2d 579. Again, we will not review a claim that has been determined under an independent and adequate state ground, and therefore this claim, likewise, is procedurally defaulted.

3.

Cone's third *Brady* claim is that certain FBI reports were withheld from him. He argues that several documents demonstrate that the FBI knew he had a severe drug problem, and that had Cone known of these documents at trial, he might have used them to impeach FBI Agent Eugene Flynn's testimony that Cone was not insane. The evidence included a nationwide FBI alert indicating Cone was a heavy drug user and an FBI document showing Cone was in possession of amphetamines in the late 1970s. In addition, Cone complains that Agent Flynn had access to a report prepared by a witness, Dr. Jonathan Lipman, who testified against Cone. Cone claims that the presence of Dr. Lipman's report in the FBI files demonstrates that Dr. Lipman was not a disinterested witness.

It appears that Cone did not make a request for the FBI documents until after he filed his second petition for post-conviction review and then he requested only FBI reports regarding himself and Ilene Blankman. His request did not refer to Dr. Lipman's report. It further appears that all of this evidence was in the DA's files and could have been discovered by Cone in 1992. He could have raised this claim in the state court in 1993, however, he did not do so. Because this claim regarding the FBI materials and Dr. Lipman's report was not raised in the state court when Cone had the opportunity to do so, it is procedurally defaulted.

4.

Cone's fourth *Brady* claim is that the prosecutors withheld evidence that Cone might have used to impeach the testimony of prosecution witness Ilene Blankman. This witness testified at trial that Cone had never used drugs in her presence. The withheld evidence, according to Cone, is that the prosecution's file showed that the prosecutors had ongoing contact with Blankman, took her to dinner, and sent her a thank you letter after the trial was concluded and Cone was sentenced. This "withheld" evidence, Cone argues, might have been useful to impeach Blankman's credibility by showing her bias. As to whether Cone has exhausted this claim, it is true that he alleged in his second amended petition that the prosecution had withheld exculpatory evidence regarding Ilene Blankman. But the state court found that claim waived for not being raised earlier. Again, we do not review a claim that has been determined under an "independent and adequate" state ground, and thus it is procedurally defaulted. We conclude that Cone has procedurally defaulted all four of his *Brady* claims.

B.

We must now inquire whether Cone has made a sufficient showing under the familiar "cause and prejudice" standard to excuse his procedural default. We first determine whether the three prerequisites to application of the cause and prejudice test have been established. We think they have. To repeat, they are: (1) that there is a state procedural rule applicable to Cone's claim and that he failed to comply with it; (2) that the state actually

enforced the state rule; and (3) that Cone's noncompliance with the rule is an independent and adequate state ground for denying state review of a constitutional claim. *Maupin*, 785 F.2d at 138. As to the first requirement, the Tennessee waiver rule is plainly applicable to Cone's *Brady* claims; second, the Tennessee courts explicitly relied upon the waiver rule when deciding whether to consider Cone's post-conviction *Brady* claims; and third, the state's legitimate interest in requiring a defendant to raise all the claims he has at one time, thus avoiding multiple bites at the apple, is an independent and adequate state ground.

We are satisfied that Cone's *Brady* claims have been procedurally defaulted in the Tennessee courts, and so the next question is whether Cone has established cause and prejudice sufficient to excuse his procedural default. Cone must show that there is a reasonable cause for his failing to raise these claims timely, and if he makes that showing, that withholding the documents unfairly prejudiced him.

It is remarkable and significant that Cone does not argue in his brief before this court that there is a justifiable *cause* for his failure to raise his first, second, and fourth *Brady* claims in a timely manner in the state courts. Instead, he argues the merits of the claims. Cone's only mention in this court of his procedural default with respect to these three *Brady* claims appears in his reply brief, wherein he simply asserts that he raised the claims in state court and thus they are *not* procedurally defaulted, a position contradicted by the findings of the Tennessee courts and by the record.

Moreover, but not surprisingly, Cone does not argue the prejudice prong of the cause and prejudice test. According to *Frady*, 456 U.S. 152, "a convicted defendant must show *both* (1) 'cause' excusing his . . . procedural default, *and* (2) 'actual prejudice' resulting from the errors of which he complains." *Id.* at 168 (emphasis added). Therefore, we have no occasion to consider whether Cone's procedural default with respect to the first, second, and fourth of his *Brady* claims is excused under the cause and prejudice standard and thus no authority to consider the claims on the merits.

Cone's third *Brady* claim, that FBI documents were allegedly withheld, was indeed raised, but only in Cone's petition for a writ of *habeas corpus* in the federal court; it was never raised in the state court. Cone argues that there is no state court procedural default with respect to this claim because the FBI records are privileged and were made available to him only through discovery granted by the federal district court in 1997, and thus he could not have successfully requested them in a timely fashion. Assuming without deciding that Cone has reasonable cause for not raising this issue timely in his state post-conviction proceedings (because he did not learn of the FBI records until 1997), the fact remains that he makes no argument that he was *prejudiced* as a result of the government's failure to disclose to him the existence of the FBI documents, and thus he completely ignores the prejudice prong of the cause and prejudice standard. We are satisfied that because he did not raise this claim in the state court and has not made a showing under the prejudice prong of the cause and prejudice standard that

would excuse his default, we may not now review this claim.

In conclusion, Cone's default in failing to raise these claims in the state court and further default in failing in the federal court to justify that failure forecloses us from reaching the merits of those claims.

VI.

Jury Instructions

Cone claims he was denied a fair trial because the trial court's jury instructions unconstitutionally equated "reasonable doubt" with "moral certainty." The challenged instruction was as follows:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a captious, possible, or imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the offense.

Although Cone admits that the reasonable doubt instruction in his case was "similar" to the instruction given and approved in *Austin v. Bell*, 126 F.3d 843 (6th Cir. 1997), he alleges that he received an additional instruction that made the instructions, when taken as a whole, unconstitutional. The additional instruction stated:

> It is not necessary that each particular fact should be proved beyond a reasonable doubt if enough facts are proved to satisfy the jury beyond a reasonable doubt of all the facts necessary to constitute the crime charged. Before a verdict of guilty is justified, the circumstances, taken together, must be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion and producing in effect a moral certainty that the defendant, and no one else, committed the offense.

The Tennessee Court of Criminal Appeals determined that since Cone did not raise the reasonable doubt argument until his second post-conviction petition, he had defaulted this claim. The court determined that Cone should not be able to "delay the administration of justice *ad infinitum* by filing subsequent petitions which disingenuously claim that the grounds asserted were unknown to the appellant when his previous petition was filed." *Cone*, 927 S.W.2d at 582. This is an independent and adequate ground that bars the consideration of these claims in this court. *Wainwright*, 433 U.S. at 87-88.

Cone argues that his jury instruction claim is not procedurally defaulted for three reasons. First, he violated no "clearly established" rule when he presented his claim in his second post-conviction petition, where he did not "knowingly and understandingly" fail to present the claim earlier, as required by Tenn. Code Ann. § 40-30-112(b). Second, he could not have defaulted his claim because there is no valid procedural default unless all similarly situated petitioners have been found defaulted by the state courts. Third, he has "cause" for

failing to raise the claim earlier because he did not have effective trial or appellate counsel.

Assuming without deciding that Cone has not procedurally defaulted his claim, or, if he has, he can show cause and prejudice, his claim is meritless. A nearly identical instruction has been approved by this court in *Austin*, 126 F.3d at 846. The instructions, taken together and in the context in which they were given, did not allow the jury to convict in order to reach a mere "satisfactory conclusion," as Cone suggests. *See Victor v. Nebraska*, 511 U.S. 1, 16 (1994).

VII.

Other Claims

We find no fault with the district court's dismissal of the claim of prosecutorial misconduct. Cone claims that the prosecution's closing argument in the guilt phase of the trial was improper and that it undercut Cone's amphetamine psychosis defense. The prosecution's argument was that the money found in Cone's car suggested that Cone was a drug seller, not a drug user. This, despite the fact that the prosecution knew that most of the money was stolen from a supermarket during Cone's crime spree.

Cone first raised this prosecutorial claim in the context of an ineffective assistance of counsel claim. The Tennessee Court of Criminal Appeals rejected the claim that the prosecution's argument affected the outcome of

the trial when it rejected his first petition for post-conviction relief. *Cone v. State*, 747 S.W.2d 353, 355 (Tenn. Crim. App. 1987).

Cone next raised the claim in his second petition for post-conviction relief. The Tennessee Court of Criminal Appeals determined that Cone's claims had been either previously determined or waived. *Cone*, 927 S.W.2d 579.

In Cone's *habeas* petition, the federal district court determined that this claim was without merit. The court found that this argument exaggerated the importance of the prosecutor's statement and ignored the fact that there was other evidence that Cone was indeed using drugs. Cone did not convince the district court that the state court's rejection of this claim "involved an unreasonable application of[ ] clearly established Federal law, as determined by the Supreme Court of the United States" under section 2254(d)(1). Rather, the district court determined that Cone's "out-of-his-mind-on-amphetamines" defense was not rejected by the jury because the prosecutor accused him of being a drug seller, but because Cone failed to present credible evidence that he had actually abused amphetamines at any time close to the murders.

In order to make a claim for prosecutorial misconduct, a defendant must demonstrate that: "(1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false." *Coe*, 161 F.3d at 343.

We find that the statements made by the prosecutor referring to Cone as a drug seller are not material, and we agree with the district court that the statement was too remote from the real issues in this case to have affected

the jury's deliberations. Cone's drug psychosis defense was not substantially undercut by the prosecutor's remarks; rather, Cone simply did not present credible evidence that he was using drugs at the time he committed the murders. Under 28 U.S.C. § 2254(d), this decision does not appear to be contrary to, or involve an unreasonable application of, clearly established Federal law as determined by the Supreme Court.

VIII.

Malice Instruction

Cone also claims that he was denied due process in that the state trial judge's instruction on malice was erroneous and unconstitutionally shifted the burden of proving this element to Cone.

Cone first raised a challenge to these instructions in his second petition for post-conviction relief. The Tennessee Court of Criminal Appeals determined that the claim had been previously determined or waived by failure to raise it earlier.

In Cone's petition for a writ of *habeas corpus*, Cone raised this issue again. However, the district court determined that this claim was procedurally defaulted. It based its decision on a procedurally similar case, *Coe*, 161 F.3d 320. In that case, the Sixth Circuit determined that the state rule was an independent and adequate ground that barred relief in this court, where the petitioner raised his claim in his second petition for post-conviction relief only, and the state court determined that his claim was previously determined or waived. In this case, the district

court relied on the finding of the Tennessee Court of Criminal Appeals that Cone raised this claim in his second petition for post-conviction relief only and thus his claim was previously determined or waived. According to *Coe*, the Court of Criminal Appeals' decision constitutes an independent and adequate ground that bars the consideration of these claims in the district court.

We agree with the district court and find that this claim is procedurally defaulted on an independent and adequate state ground. However, if Cone is able to demonstrate cause and prejudice, his default would be excused.

Cone argues that even if he did fail to raise timely his claim of an erroneous jury instruction on malice, he has not defaulted the claim for several reasons. First, he did not give a personal "knowing[ ] and understanding[ ]" waiver, as required by the Tennessee statute, since he is not chargeable for any waiver made by his attorney. Tenn. Code Ann. § 40-30-112 (1990) (since repealed). Second, he argues that his claim cannot be defaulted because there can be no procedural default unless all similarly situated petitioners have been found defaulted by the state courts. Third, Cone claims that during the time of his state petitions for post-conviction relief, Tennessee law was in a state of confusion as to whether an "objective" or "subjective" standard was to be used in determining whether a claim was waived. Cone does not clearly explain his understanding of the difference between the "objective" and "subjective" standards to which he refers, and we do not find these terms helpful.

First, we are aware of two cases in which courts have considered whether a petitioner is bound by his attorney's waiver of a constitutional claim, *Coe*, 161 F.3d 320, and *House v. State*, 911 S.W.2d 705 (Tenn. 1995). The *House* court stated that "[w]aiver in the post-conviction context is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney." *House*, 911 S.W.2d at 714. *House* does not appear to announce a new standard, as Cone suggests. Rather, it seems merely to affirm Tennessee's standard of waiver.

In *Coe*, as we explained earlier, this court held that the petitioner had procedurally defaulted his state claim that the trial court failed to give a correct malice instruction. He presented the claim for the first time in his second petition for post-conviction relief rather than his first petition, as a consequence of which the Tennessee Court of Criminal Appeals found it had been procedurally waived. *Coe*, 161 F.3d at 329-31. This court cited *House* when determining that Coe had defaulted his claim under an "objective" standard of waiver. However, the petition upon which the court relied in finding the default was filed before *House* was decided. Thus, concerning defaults that occurred before *House* was decided, the Tennessee courts have strictly and regularly applied the traditional standard of waiver, whether the waiver is made by counsel or the petitioner personally.

The cases that Cone cites to support his position that a petitioner must "knowingly and understandingly" waive a constitutional right are not helpful because they are distinguishable from his case. Those cases are either: (1) unpublished (*Richardson v. Dutton*, No. 86-5437, 1987

WL 38229 (6th Cir. Nov. 18, 1987)); (2) determined after Cone filed his petition and thus he could not have relied on them (*Wooden v. State*, 898 S.W.2d 752 (Tenn. Crim. App. 1994), *Johnson v. State*, No. 02C01-9111-CR-00237, 1994 WL 90483 (Tenn. Crim. App. Mar. 23, 1994)); or (3) hold that a petitioner did not personally waive claims by not raising them earlier on the ground that the petitioner did not have counsel at the time (*Swanson v. State*, 749 S.W.2d 731 (Tenn. 1988), *Freeman v. State*, No. 70, 1988 WL 94769 (Tenn. Crim. App. Sept. 14, 1988)).

Cone's second reason why his claim cannot be defaulted also fails. He claims that there can be no valid procedural default unless all similarly situated petitioners have been found defaulted by the state courts. *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982). This is, essentially, an argument that the state ground is not considered adequate unless the procedural rule is strictly and regularly followed. *Id.* However, as explained in *Coe*, the Tennessee courts have strictly, regularly, and consistently followed the waiver rule in similar cases. *Coe*, 161 F.3d at 331.

Last, we are not persuaded that Cone is correct in his claim that Tennessee law was in a state of confusion on whether an "objective" or "subjective" standard of waiver is appropriate. It is not clear from the Tennessee cases that procedural default may not be charged to a petitioner who has not himself "knowingly and understandingly" waived timely assertion of a federal constitutional claim when his attorney has done so. We are satisfied that Tennessee follows the traditional rule that a petitioner is chargeable with his attorney's failure to

timely assert a claim and with the consequences of failing to do so.

In one sentence, Cone claims that an additional cause for his failure to raise the malice instruction issue in the state court is the ineffectiveness of his state counsel. Cone makes no argument, factual or legal, in support of his assertion, but newly instructs the reader to "*See* pp. 56-58, supra." Reference to those pages indicates that Cone appears to be incorporating by reference his earlier argument with respect to the defaulted reasonable doubt/moral certainty instructional issue, that "trial and appellate counsel . . . may have been ineffective" because in the state court appeal, weaker legal issues were raised and "this was counsel[']s first capital trial and appeal."

Although it is well settled that the ineffective assistance of trial or appellate counsel may be cause sufficient to excuse a procedural default in raising a federal constitutional issue in state court, it is also settled that the petitioner must show both cause and prejudice to excuse the default. *See Coleman*, 501 U.S. at 750-51; *Frady*, 456 U.S. at 168-69. In this instance, while Cone claims ineffectiveness of counsel as the cause for his default, he does not claim any prejudice; he makes no mention of the prejudice prong of the cause and prejudice test at all.

For that reason alone, we would be justified in rejecting his ineffectiveness-of-counsel-as-cause argument. *See Frady*, 456 U.S. at 170. But Cone's argument fails for the more fundamental reason that he has not shown that his state counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, Cone must show that in failing to raise the malice instruction issue in

the state court, his "counsel's performance was deficient," which requires a "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

Cone has utterly failed to meet the requirements of *Strickland* with respect to this issue. In the first place, he makes no independent argument, factual or legal, relating to his failure to raise the malice instruction issue in the state court of his attorney's performance. He merely invites us to "see" his argument that his counsel was constitutionally ineffective for failing to raise an altogether different instructional issue because "weaker" issues were raised and it was counsel's first capital case. Succinctly put, this sort of parenthetical instruction to this court to piece together a constitutional claim of ineffectiveness of counsel from the language Cone used in presenting the claim with a different instructional issue early in his brief does not meet his obligation under *Strickland*. Even if we were to heed Cone's instruction to us to assemble his ineffective assistance of counsel argument for him, the argument would fail because (1) counsel's failure to raise every conceivable issue on appeal that might have been raised, even issues arguably stronger than those that were raised, and (2) handling one's first capital case, are not, *per se*, "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*

In addition, as we have said, Cone makes no claim whatever that he was prejudiced as a result of the trial court's malice instruction.

For these reasons, Cone has not satisfied his burden under the cause and prejudice test, and we may not therefore reach the procedurally defaulted malice instruction issue.

IX.

Cruel and Unusual Punishment

We decline to address Cone's Eighth Amendment cruel and unusual punishment argume... and his argument concerning the application of aggravating circumstances because we have vacated the death sentence for the reasons set forth below.

X.

The Death Sentence

Cone argues that his death sentence must be vacated because he was denied the effective assistance of counsel at his sentencing as guaranteed by the Sixth Amendment. He claims that at sentencing his counsel offered no evidence whatever in mitigation and made no argument of any sort prior to sentencing. We agree that Cone was denied the effective assistance of counsel, and accordingly, we must vacate his death sentence.

Before going to the merits of this issue, it is appropriate to describe its procedural route to this court. Cone raised the issue of the ineffectiveness of his counsel at sentencing in his first petition for post-conviction relief, arguing that his trial counsel was ineffective for failing to present mitigating evidence at the sentencing phase of the trial and for waiving final argument. The Tennessee

court determined that the attorney's silence at Cone's sentencing was not ineffective assistance because it was part of the attorney's "strategy" to prevent the prosecutor from making a "devastating" closing argument, for which he was apparently well-known. The trial court stated, in its September 19, 1986, opinion on Cone's first petition for post-conviction relief:

> This Court finds from the facts and circumstances that [defense counsel] put a great deal of thought and preparation in this case; further, he pointed out he interviewed numerous family members and relatives whose testimony was contradictory and generally not helpful. He said his strategy was to get as much mitigation in during the guilt/innocence phase as he could. It is the opinion of this Court that the defense attorney's performance, including his decision not to introduce any evidence in mitigation, did not fall below the objective standard of reasonableness set by the Sixth Amendment's guarantee of the effective assistance of counsel. . . .
>
> In reference to the waiver of final argument in the penalty phase it was clear [from] testimony from the record that this was strategy on the part of defense counsel, in view of the prosecutor's . . . reputation for devastating closing arguments.

This decision was affirmed on appeal to the Tennessee Court of Criminal Appeals, which stated in part:

> One of the prosecuting attorneys made a low-key opening argument after the punishment hearing. It was trial counsel's judgment that he should waive argument to prevent the other

> prosecuting attorney from making closing argument. The other prosecutor was capable of making very devastating closing arguments and he could not be answered by defense counsel. This is a legitimate trial tactic, the exercise of which furnishes no basis for a finding of ineffective assistance.

Cone, 747 S.W.2d at 357.

Cone raised this issue again in his second petition for post-conviction relief. At that time, the Tennessee court determined that the claim was either previously determined or waived and the court dismissed it. On appeal, the Tennessee Court of Criminal Appeals reversed. The court cited *Swanson*, 749 S.W.2d 731, for the proposition that a petition for post-conviction relief, which stated a colorable claim for relief, should not be dismissed as having been waived without an opportunity to show the lack of waiver, unless waiver is clear. The court remanded the case to allow Cone to "rebut the presumption of waiver." However, on remand, the trial court determined that all of Cone's ineffective assistance of counsel claims – those relating to the guilt phase and those relating to the sentencing phase – should be considered as one claim.

Cone raised the issue for the third time in his petition for a writ of *habeas corpus* in the federal district court. The respondent does not argue that Cone's ineffective assistance of counsel claim based on the lack of mitigating evidence at sentencing and the failure to make a final argument is procedurally defaulted. Therefore, the claim is properly before us.

A claim of ineffective assistance of counsel presents mixed questions of law and fact which this court reviews

de novo. *United States v. Jackson*, 181 F.3d 740, 744 (6th Cir. 1999). To repeat, in order to succeed on an ineffective assistance of counsel claim, a petitioner must show:

> First, . . . that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687.

Under the first prong of *Strickland*, we must determine whether Cone's counsel, in remaining completely silent during the sentencing phase of the trial, except to declare that he "rested" – offering no evidence in mitigation and declining to address the court and jury – acted within an objective standard of reasonableness. *Olden v. United States*, 224 F.3d 561, 565 (6th Cir. 2000). If he did not, we must then turn to the second prong of *Strickland* and determine whether the petitioner has demonstrated a reasonable probability that he would not have been sentenced to death but for his counsel's failure. *Strickland*, 466 U.S. at 693-94.

In an appropriate case, *Strickland*'s prejudice prong may be presumed. *United States v. Cronic*, 466 U.S. 648 (1984).

> The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. . . . But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

Id. at 656-57.

For example: "[I]f the accused is denied counsel at a critical stage of his trial [or] . . . if counsel *entirely fails* to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* at 659 (emphasis added) (footnote omitted). In such a case, it is not necessary to demonstrate actual prejudice. *Rickman v. Bell*, 131 F.3d 1150, 1155 (6th Cir. 1997). Moreover, a defendant may demonstrate the "constructive" denial of counsel when, although counsel is present, " 'the performance of counsel [is] so inadequate that, in effect, no assistance of counsel is provided.' " *Cronic*, 466 U.S. at 654 n.11 (quoting *United States v. Decoster*, 624 F.2d 196, 219 (D.C. Cir. 1976) (MacKinnon, J., concurring)).

Whether the failure to introduce any mitigating evidence and the waiver of final argument in the sentencing phase of a death penalty case constitute ineffective assistance of counsel must be determined on a case-by-case basis. The failure to present mitigating evidence in a death penalty case does not necessarily constitute ineffective assistance of counsel, *see Darden v. Wainwright*, 477 U.S. 168, 184-87 (1986); *see also Moore v. Reynolds*, 153 F.3d 1086, 1105 (10th Cir. 1998), *cert. denied*, 526 U.S. 1025

(1999), although given the uniqueness of the death sentence, the absence of any mitigating evidence, combined with a waiver of oral argument, plainly raises a "red flag." When the waiver of final argument is part of a legitimate trial strategy, great latitude is given to the decision of the attorney. *Moore*, 153 F.3d at 1104.

However, where the waiver is not based on a sentencing strategy, or is based upon a decision called "strategy" which no reasonable observer could credit as involving any logically defendable analysis, the attorney may have performed in a deficient manner. *Smith v. Stewart*, 140 F.3d 1263, 1269 (9th Cir. 1998). An attorney's decision to present no evidence whatever in mitigation and, *in addition*, to offer no argument when his client faces the prospect of being sentenced to death may amount to a virtual abandonment of the adversarial process that results in injustice, thus demonstrating both deficient performance and prejudice. *Kubat v. Thieret*, 867 F.2d 351, 368-70 (7th Cir. 1989).

This court has found that counsel's failure "to investigate and present any mitigating evidence during the sentencing phase so undermined the adversarial process that [defendant's] death sentence was not reliable." *Austin*, 126 F.3d at 848. Where mitigating evidence was available, but not adequately investigated and not presented at sentencing, this "does not reflect a strategic decision, but rather an abdication of advocacy." *Id.* at 849.

It is indisputable that Cone's trial attorney presented no mitigating evidence at all and made no final argument; he did not even ask the jury to spare his client's

life. However, Cone's attorney testified at the post-conviction hearing that he had several strategic reasons why he decided to waive final argument, admittedly a "radical tactic" at the penalty phase of a capital case. First, he thought that he had presented to the jury during the guilt phase almost every mitigating circumstance available. He claimed that since the jury is charged to consider those factors in its penalty phase deliberations, he did not have to put the evidence on a second time. Second, he claims that he "sucker[ed]" the prosecution into putting on mitigating evidence of Cone's Bronze Star decoration from Vietnam without having Cone testify. Third, he claims he thought the trial judge had "lost control" of the case. Fourth, he claims that Cone told him he would "explode" if he got on the stand. Fifth, he explained that he made his penalty phase "closing argument" in his opening statement during the guilt phase, and therefore, did not need to make a closing argument. Sixth, he explained his use of a rather confusing and convoluted theory on how he planned to get the jury to find an illegal aggravating circumstance, which would be the basis for later having the whole penalty phase thrown out. Last, he claimed that he wanted to prevent the prosecutor from making one of his notorious "devastating" closing arguments.

While these post hoc justifications, given in testimony at Cone's post-conviction hearing, surely amount to *explanations* for counsel's silence at sentencing and may have been "tactical" decisions, they do not necessarily defeat Cone's claim that his attorney's refusal to plead for Cone's life amounted to constitutional ineffectiveness.

A trial lawyer accused of constitutional ineffectiveness for failing to act where action is ordinarily indicated

will almost always have a reason for declining to act. The reason will usually be called the lawyer's "strategy." But the noun "strategy" is not an accused lawyer's talisman that necessarily defeats a charge of constitutional ineffectiveness. The strategy, which means "a plan, method, or series of maneuvers or stratagems for obtaining a specific goal or result," Random House Dictionary 1298 (Rev. ed. 1975), must be reasonable. It need not be particularly intelligent or even one most lawyers would adopt, but it must be within the range of logical choices an ordinarily competent attorney handling a death penalty case would assess as reasonable to achieve a "specific goal."

Here, the goal, the only conceivable goal, was to persuade the jurors not to sentence Cone to death. How counsel's refusal even to ask the jurors to do that could be called a reasonable strategy to achieve the goal, eludes us.

Even if we add up all of counsel's claimed strategic tactics, only one of which was apparently credited by the Tennessee appellate courts and the district court below – avoiding a "devastating" argument by the prosecutor – we think a reasonable attorney would have realized the absolute necessity of arguing for his client's life by making a closing argument. In addition, counsel had plenty of mitigating evidence at his fingertips; yet he failed to present it at the sentencing phase.

We reject out of hand, the argument that a competent attorney would determine that not presenting mitigating evidence of any kind and not making a final argument in a death penalty case is a justifiable "strategy" because doing so might trigger a "devastating" response by the

prosecutor – the sole reason assigned by the Tennessee courts for excusing counsel's silence. How much worse off could Cone have been if he were sentenced to death after a "devastating" argument by the prosecutor than if he were sentenced to death after the prosecutor's "mild" request that he be sentenced to death, which was followed by his own attorney's silence? Or, asked differently: How much more devastating for the petitioner could the prosecutor's "devastating" argument have been than the death sentence the petitioner got without such argument?

We can only imagine the effect on the jurors when Cone's defense counsel refused even to ask them to spare his client's life. They could only have inferred that Cone's counsel was, by his silence, acquiescing to the prosecutor's plea that Cone be sentenced to death. *See Stewart*, 140 F.3d at 1270. Cone may well have fared better if his counsel had left the courtroom entirely for the sentencing phase of the trial. If that had occurred, the jurors could not have inferred, as indeed they must have, that counsel's knowing and purposeful silence was an implicit agreement that justice required that Cone be put to death. When a man faces the gallows and his attorney sitting next to him declines even to ask the jurors to spare his life in the name of simple mercy, the attorney ought to have a most compelling reason for failing to speak – one that would incline a reasonable observer to credit as a sentencing strategy that is legally and factually justified. The reasons Cone's counsel has given are totally unreasonable, given the stakes. This was not "strategic" representation; it was nonrepresentation of the most deadly sort.

Under *Cronic*, a presumption of prejudice is raised by counsel's behavior; thus, Cone need not show actual prejudice. Essentially, Cone did not have counsel during the sentencing phase of his trial and thus the prosecutor's insistence that justice required that Cone be put to death was not subjected to "meaningful adversarial testing." *Cronic*, 466 U.S. at 656. We find that counsel's abandonment of Cone at possibly the most "critical stage of his trial" fell below an objective standard of reasonableness and prejudiced him, which resulted in the ineffective assistance of counsel under the Sixth Amendment. *Id.* at 659.

But the state of Tennessee has held that Cone's lawyer's behavior was not ineffective under *Strickland* and we may not disturb that ruling unless we are convinced that it constitutes a "decision that is contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). We conclude that Cone's counsel's refusal to offer any evidence in mitigation and refusal even to address the jurors to ask them to spare Cone's life because counsel feared the prosecutor might make a "devastating" argument denied Cone his Sixth Amendment right to counsel at sentencing and that the Tennessee court's conclusion to the contrary is an unreasonable application of the clearly established law announced by the Supreme Court in *Strickland*.

XI.

Conclusion

We **AFFIRM** the district court's refusal to issue a writ of *habeas corpus* with respect to the petitioner's conviction, but we **REVERSE** the district court's judgment as to the petitioner's sentence. We **REMAND** to the district court with instructions to issue a writ of *habeas corpus* vacating the petitioner's death sentence due to the ineffective assistance of counsel at sentencing, unless the state conducts a new penalty phase proceeding within 180 days after remand.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

GARY BRADFORD CONE,	×	
Petitioner,	×	
	×	No. 97-2312-M1/A
vs.	×	
RICKY BELL,	×	
	×	
Respondent.	×	

ORDER DENYING MOTION FOR
EVIDENTIARY HEARING
AND
ORDER OF PARTIAL DISMISSAL

(Filed May 15, 1998)

I. INTRODUCTION

This matter is before the Court on petitioner's Motion for Evidentiary Hearing, filed October 14, 1997. Petitioner, Gary Bradford Cone, an inmate at Riverbend Maximum Security Facility in Nashville, Tennessee, filed a habeas petition pursuant to 28 U.S.C. § 2254, attacking his state conviction of two counts of first degree murder, and the death penalty imposed for those crimes. The respondent warden has filed an answer raising various grounds for dismissing the petition, and the petitioner has filed a motion for an evidentiary hearing as to certain claims. For the reasons set forth below, petitioner's motion is DENIED and the claims addressed in his motion are DISMISSED.

This document entered on docket sheet in compliance with Rule 58 and/or 79 (a) FRCP on 5/18/98.

II. STATE COURT PROCEDURAL HISTORY

A. *Facts of the Crime*

Examination of the record reveals the following undisputed facts. On Saturday, August 9, 1980, Cone robbed a jewelry store in Memphis, Tennessee of about $112,000 worth of expensive watches, rings and other jewelry. Shortly after the robbery, police received a description of the robber from the store manager, spotted petitioner driving his 1972 gray Oldsmobile, and followed him at a normal speed. The suspect became alarmed and led police on a high-speed chase through mid-town Memphis and into a residential neighborhood. There he abandoned his automobile, shot pursuing police officer B. C. Allen, and a citizen, John Douglas Clark, who challenged him, and tried to shoot a third citizen, Herschel Dalton, when Dalton refused to give Cone his car. During the afternoon of August 9, 1980, police seized Cone's car, but he eluded them only to resurface early the next morning in the same neighborhood at the door of Lucille Tuech's apartment. She refused him admittance to make a telephone call and he drew a pistol on her. In the meantime the police had inventoried the car's contents and discovered a large amount of cash, some of which was later attributed to an earlier robbery of a grocery store, an enormous quantity of drugs, and the jewelry store's stolen property.

On the afternoon of Sunday, August 10, 1980, Cone broke through the rear door of the nearby home of an

elderly couple, Shipley O. Todd and his wife, Cleopatra Todd. Mr. Todd was 93 years old and his wife was 79. Cone attempted to coerce them into helping him, and then killed them when they stopped cooperating with him. After the murders, relatives of the Todds became concerned because they were unable to contact the Todds at their home. Three days after the murders, the bodies of Mr. and Mrs. Todd were found in their home, horribly mutilated and cruelly beaten. The police found Cone's fingerprints and hair samples in the ransacked home. Cone then went to the airport and flew from Memphis to Florida, where he appeared at the home of an acquaintance on August 12, 1980. Cone was thereafter arrested on charges in Florida, and the Memphis police investigation led to his arrest and return to Tennessee on charges arising out of the August 9-10, 1980 crimes.

B. *Petitioner's State Court Trial Proceedings*

On August 19, 1980, a Shelby County Grand Jury indicted Cone for first degree murder in the perpetration of a burglary and first degree murder in the death of Shipley Todd, (case number B-74703), and first degree murder in the perpetration of a burglary and first degree murder in the death of Cleopatra Todd, (case number B-74702). *See* Addendum 1, Document 1, (State Court Record), at 2-8. On September 5, 1980, the grand jury indicted Cone for assault with intent to commit murder in the first degree against Dalton, (case number B-74898), assault with intent to commit murder in the first degree against Officer Allen, (case number B-74898), assault with intent to commit murder in the first degree against Clark

(case number B-74899), and robbery with a deadly weapon of the jewelry store, (case number B-74902). *Id.* at 11-19.

From April 14 to 23, 1982, Criminal Court Judge James C. Beasley, Sr., presided at a jury trial, which concluded with the jury finding Cone guilty on all charges and sentencing him to 10 to 25 years on the assaults, life imprisonment on the robbery, and death on the two murder indictments. *Id.* at 165-68. Cone appealed as of right to the Tennessee Supreme Court, which affirmed the conviction and sentence. *State v. Cone*, 665 S.W.2d 87 (Tenn. 1984), *cert. denied, Cone v. Tennessee*, 467 U.S. 1210 (1984). Addendum 1, Docs. 4, 7.

C. *State Court Collateral Proceedings – First Petition*

On June 22, 1984, Cone filed, through counsel, his first post-conviction petition attacking the conviction and death sentence. In that petition, he contended his rights had been violated under the First, Fourth, Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution, and under various state laws, rules of court, and constitutional provisions. In particular, he claimed that his attorney had provided ineffective assistance of counsel by failing to: 1) advise him properly; 2) make timely objections; 3) conduct adequate voir dire of the jury; or 4) discuss penalty stage strategy. Addendum 2, Doc. 1 at 27-29.

On November 21, 1984, Cone's post-conviction counsel filed an amended petition claiming that the prosecutors engaged in misconduct during the closing arguments

of the guilt phase of Cone's trial by arguing that the jurors should reject Cone's drug-user defense[1] because the amount of money in the car tended to show that he was a drug seller, not a drug user, even though the prosecutors knew the money came from an earlier grocery store robbery. The amended petition further claimed that petitioner's trial counsel provided ineffective assistance by:

1) failing to offer proof of mitigating circumstances during the penalty phase of the murder trial; First Post-Conviction Petition, ¶ 11(a), Adden. 2, Doc. 1 at 51;

2) failing to make a closing argument during the penalty phase of the murder trial; First Post-Conviction Petition, ¶ 11(a), Adden. 2, Doc. 1 at 51;

3) failing to advise Cone regarding whether any privilege protected statements he made during examinations by Dr. Bursten, a state psychiatrist; First Post-Conviction Petition, ¶ 11(e), Adden. 2, Doc. 1 at 52;

4) failing to adequately investigate Cone's background and personal and medical history for mitigating evidence; First Post-Conviction Petition, ¶ 11(d), Adden. 2, Doc. 1 at 52;

5) failing to adequately advise Cone regarding his decision not to testify at either the guilt or penalty phase of the trial; First Post-Conviction Petition, ¶ 11(c), Adden. 2, Doc. 1 at 51.

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[1] Cone's defense was "amphetamine psychosis".

The state court held a hearing, and on September 19, 1986, denied Cone's petition. *See* Adden. 2, Doc. 1 at 105. Cone then appealed to the Tennessee Court of Criminal Appeals, claiming, *inter alia*, that counsel provided ineffective assistance:

1) by failing to offer proof of mitigating circumstances during the penalty phase of the murder trial; First Post-Conviction Petition Appellate Brief, ¶ II(c)4, Adden. 2, Doc. 2 at 26;

2) by failing to make a closing argument during the penalty phase of the murder trial; First Post-Conviction Petition Appellate Brief, ¶ II(c)5, Adden. 2, Doc. 2 at 28; and

3) by failing to conduct adequate cross-examination of the State's expert witnesses during the guilt phase of the murder trial; First Post-Conviction Petition Appellate Brief, ¶ II(c)3, Adden. 2, Doc. 2 at 25.

He also raised the claim that the prosecutors engaged in misconduct during the closing arguments of the guilt phase by arguing that jurors should reject Cone's drug-user defense because the amount of money in the car tended to show that he was a drug seller, not a drug user. First Post-Conviction Petition Appellate Brief, ¶ I, Adden. 2, Doc. 2 at 12.

On November 4, 1987, the Court of Criminal Appeals rejected these claims and affirmed. Adden. 2, Doc. 4. On December 21, 1987, Petitioner, through counsel, sought permission to appeal to the Tennessee Supreme Court, raising only the claims of prosecutorial misconduct, and if ineffective assistance based on counsel's failure to present proof of mitigation and failure to make a closing

argument during the penalty phase of the murder trial. Adden. 2, Doc. 5. On March 14, 1988, the Tennessee Supreme Court denied permission to appeal. Adden. 2, Doc. 7.

D. *State Collateral Proceedings – Second Petition*

On June 15, 1989, Cone filed, *pro se*, a second state post-conviction petition. On June 22, 1989, Cone filed a *pro se* amended petition. The trial court dismissed the petition as barred by the successive petition restrictions of Tennessee's post-conviction statute. On May 15, 1991, the Court of Criminal Appeals reversed, however, and remanded to permit Cone an opportunity to rebut the presumption of waiver. Adden. 3, Doc. 4.

On August 13, 1993, Cone's post-conviction counsel filed a second amended petition raising 35 claims of ineffective assistance of counsel.[2] On October 5, 1993, counsel filed a third amended petition, raising claims which were numbered 41 through 52. Claim 41 contended that the State had withheld exculpatory evidence tending to prove that Cone did suffer from drug-induced psychosis. Claim 44 contended that Cone's trial counsel provided ineffective assistance by failing to offer any proof of mitigating circumstances during the sentencing hearing. Claim 47 contended that the trial court violated Cone's Sixth Amendment rights by refusing to permit him to sit at counsel table with his attorney during trial.

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[2] A table comparing the ineffective assistance claims raised in Cone's post-conviction petition and this federal petition is attached as an Exhibit to this order.

Claim 48 contended that counsel provided ineffective assistance by improperly cross-examining the state's medical expert witnesses, and that Cone had been denied exculpatory evidence that would have enabled counsel to impeach their testimony. Claim 51 contended that death by electrocution amounts to cruel and unusual punishment in violation of the Eighth Amendment. On November 12, 1993, counsel filed a fourth amended petition raising no new actual claims, but arguing that the claims already presented in that proceeding were not barred by the waiver provisions of Tenn. Code Ann. § 40-30-112(b).

On April 24, 1994, the state trial court dismissed the petition under Tenn. Code Ann. § 40-30-112(b), holding that all grounds raised in the amended petition were barred as either previously determined or waived. Adden. 4, Doc. 1 at 230. On March 22, 1995, the Tennessee Court of Criminal Appeals affirmed. *Id.*, Doc. 5. On March 4, 1996, the Tennessee Supreme Court denied Cone's application for permission to appeal. *Id.*, Doc. 11.

Cone then filed a motion for rehearing, contending that the 1992 decision of *Capital Case Resource Center v. Woodall*, No. 01A01-9104-CH-00150, 1992 WL 12217, (Tenn. App. Jan. 29, 1992), had opened access to previously unavailable records from the prosecutor's file. *Id.*, Doc. 12. Cone argued under *Caldwell v. State*, 1996 WL 74160 (Tenn. Feb. 20, 1996), that claims only ascertainable after the *Capital Case Resource Center* holding constituted "late-arising" claims under state law. Cone argued that he should be permitted to have these claims considered on the merits. In his motion for rehearing, Cone also argued that his claims that depended on the hiring of expert witnesses and investigative services should also not be

deemed waived, because the Tennessee Supreme Court decision enunciating a procedure for obtaining such services during a post-conviction proceeding was not decided until 1995. *Owens v. State*, 908 S.W.2d 923 (Tenn. 1995). On May 6, 1996, the Tennessee Supreme Court denied the motion for rehearing. Adden. 4, Doc. 13. On October 15, 1996, the United States Supreme Court denied Cone's petition for certiorari.

E. *Federal Court Habeas Petition*

Petitioner then filed a motion in the United States District Court for the Middle District of Tennessee to stay his execution pending appointment of counsel and the filing of this federal habeas petition. The Middle District Court transferred the case to this court, which granted the stay, appointed counsel, and permitted the filing of this petition.

III. CLAIMS FILED IN THIS PETITION

This petition asserts numerous grounds for relief. This order is concerned only with the claims on which Cone seeks an evidentiary hearing. Cone's motion seeks an evidentiary hearing on claims numbered 39, 40, 41, 61, and 65 in his habeas petition. The state has opposed this motion contending both that the claims do not merit a hearing under § 2254, and that the claims are mostly barred by Cone's procedural default. Cone contends that the claims are not procedurally defaulted.

A. *Law Governing Procedural Default*

Twenty-eight U.S.C. § 2254(b) states, in pertinent part:

> (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) an application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.[3]

Thus, a habeas petitioner must first exhaust available state remedies before requesting relief under § 2254. *See, e.g., Granberry v. Greer,* 481 U.S. 129 (1987); *Rose v. Lundy,*

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[3] The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996) (codified, *inter alia,* at 28 U.S.C. § 2244 et seq.) ("AEDPA"), substantially revised the procedural and substantive standards by which state prisoners can seek habeas relief from the federal courts. The quotation of 28 U.S.C. § 2254(b) is from the revised, post-AEDPA version of the subsection. For purposes of procedural default analysis, the changes to § 2254(b) are not significant.

455 U.S. 509 (1982). *See also* Rule 4, Rules Governing Section 2254 Cases in the United States District Courts. A petitioner has failed to exhaust his available state remedies if he has the opportunity to raise his claim by any available state procedure. *Preiser v. Rodriguez,* 411 U.S. 475, 477, 489-90 (1973).

To exhaust these state remedies, the applicant must have presented the very issue on which he seeks relief from the federal courts to the courts of the state that he claims is wrongfully confining him. *Picard v. Connor,* 404 U.S. 270, 275-76 (1971); *Rust v. Zent,* 17 F.3d 155, 160 (6th Cir. 1994). "[A] claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts which entitle the petitioner to relief." *Gray v. Netherland,* 116 S. Ct. 2074, 2081 (1996) (citing *Picard,* 404 U.S. at 271). " '[T]he substance of a federal habeas corpus claim must first be presented to the state courts.' " *Gray,* 116 S. Ct. at 2081 (quoting *Picard,* 404 U.S. at 278). A habeas petitioner does not satisfy the exhaustion requirement of 28 U.S.C. § 2254(b) "by presenting the state courts only with the facts necessary to state a claim for relief." *Gray,* 116 S. Ct. at 2081.

Conversely, "[i]t is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court." *Id.* When a petitioner raises different factual issues under the same legal theory, he is required to present each factual claim to the highest state court in order to exhaust his state remedies. *See Pillette v. Foltz,* 824 F.2d 494, 497-98 (6th Cir. 1987). He has not exhausted his state remedies if he has merely presented a particular

legal theory to the courts, without presenting each factual claim. *Id.* The claims must be presented to the state courts as a matter of federal law. "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982). *Cf. Duncan v. Henry*, 115 S. Ct. 887, 888 (1995) ("If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court."). *Cf. Gray*, 116 S. Ct. at 2081.

Moreover, the state court must address the merits of those claims. *Coleman v. Thompson*, 501 U.S. 722, 734-35 (1991). If the state court decides those claims on an adequate and independent state ground, such as a procedural rule prohibiting the state court from reaching the merits of the constitutional claim, the petitioner is barred by this procedural default from seeking federal habeas review, unless he can show cause and prejudice for the default. *See Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977).

When a petitioner's claims have never been actually presented to the state courts, but a state procedural rule prohibits the state court from extending further consideration to them, the claims are deemed exhausted, but procedurally barred. *Coleman*, 501 U.S. at 752-53; *Teague v. Lane*, 489 U.S. 288, 297-99 (1989); *Wainwright*, 433 U.S. at 87-88; *Rust*, 17 F.3d at 160.

A petitioner confronted with either variety of procedural default must show cause and prejudice for the default in order to obtain federal court review of his

claim. *Teague*, 489 U.S. at 297-99; *Wainwright*, 433 U.S. at 87-88. Cause for a procedural default depends on some "objective factor external to the defense" that interfered with the petitioner's efforts to comply with the procedural rule. *Coleman*, 501 U.S. at 752-53; *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

A petitioner may avoid the procedural bar, and the necessity of showing cause and prejudice, by demonstrating "that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. The petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent of the crime." *Schlup v. Delo*, 115 S. Ct. 851, 865-66 (1995) (quoting *Murray*, 477 U.S. at 496). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 115 S. Ct. at 867.

B. *Analysis of Petitioner's Claims*

In this case, analyzing procedural default has been made more difficult by the petitioner's confusing presentation of his claims, and the respondent's failure to articulate which specific claims are subject to which specific procedural default. Paragraphs 39, 40, 41, 61, and 65 of Cone's petition contain a total of fifty-one claims in subparagraphs, (39(a-k) and 40(a-rr)), upon each of which

petitioner claims entitlement to an evidentiary hearing.[4] Of these fifty-one claims, however, only four are both properly exhausted and not the subject of some procedural default during the state court proceedings. Cone's contention in claim 40(h), repeated at 40(qq), that his attorney provided ineffective assistance when he failed to present any proof in mitigation of the death penalty was decided adversely to Cone during the first

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[4] Cone's counsel divided the petition into paragraphs and subparagraphs, not all of which actually contain different claims. Subparagraph 39(b) and (c) simply consist of argument regarding the exculpatory effect of the eight allegedly exculpatory documents listed in subparagraph 39(a). Subparagraph 39(d) is an introduction to a *Brady v. Maryland*, 373 U.S. 83 (1963), claim based on the ten documents listed in subparagraph 39(e). Subparagraphs 39(f)-(h) actually enunciate the *Brady* claim based on those documents. Subparagraph 39(i) recites six documents which Cone's counsel assert reflect on the veracity of prosecution rebuttal-witness Ilene Blankman. Subparagraph 39(j) asserts a *Brady* claim based on evidence that money recovered from Cone's car was returned to the grocery store. Subparagraph 39(k) generally reasserts all of the previously asserted *Brady* claims. The Court construes these as four different claims:

1) a *Brady* claim that the prosecutor failed to reveal documents in the prosecutor's filed related to Cone's drug use;
2) a *Brady* claim based on the prosecution's failure to reveal documents in the FBI's possession related to Cone's drug use;
3) a *Brady* claim based on the prosecution's failure to reveal documents related to Blankman's testimony; and
4) a *Brady* claim based on the prosecution's failure to reveal that money seized from Cone's car was returned to the grocery store.

state post-conviction proceeding. Claim 40(i), that his attorney provided ineffective assistance by not making any closing argument at the penalty phase of the trial, was likewise decided against Cone on the merits during that same proceeding. Claim 39(j) duplicates claim 41. Cone contends that he was deprived of due process by the prosecutor's guilt-phase closing argument that jurors should reject Cone's drug-user defense because the amount of money found in Cone's car tended to show that he was a drug seller, not a drug user, even though the prosecutors knew the money came from an earlier grocery store robbery. This claim was decided on the merits adversely to petitioner during the first post-conviction proceeding, and was included in Cone's application of permission to appeal to the Supreme Court. Finally, claim 61, that electrocution is cruel and unusual, was decided adversely to Cone on his direct appeal from his conviction and sentence.

The remaining claims have never been presented on the merits to the Tennessee Supreme Court. Particular mention should be made of several claims. Cone's ineffective assistance claims 40(h), 40(j) through 40(gg), and 40(qq) are simply verbatim repetitions of claims he originally stated in the *pro se* state petition he filed on June 15, 1989, amended on June 22, 1989, and amended again on August 13, 1993. *See* Adden. 3, Doc. 1, at 28-31, 38-40; Adden. 4, Doc. 1, at 67-71.

Claim 40(g), that counsel provided ineffective assistance by failing to introduce evidence that Cone had won a Bronze Star in Vietnam, is frivolous in light of Cone's submission, during the trial phase of the first post-conviction proceeding, of proposed findings of fact asserting

that counsel did in fact obtain admission of this evidence. Adden. 2, Doc. 1 at 97. This evidence was admitted during the penalty phase of Cone's trial. Trial Trans. at 2123. Accordingly, this claim is DISMISSED.

Claim 40(r), that Cone's trial counsel had inadequate experience and expertise to handle a death penalty case is not an assertion of a Sixth Amendment violation. A Sixth Amendment claim requires a showing of deficient performance by counsel, and prejudice to the defendant from the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). While counsel's experience is evidence on which a court might rely in evaluating counsel's performance, it is not in itself a basis for relief. Accordingly, this claim is DISMISSED.

Claim 40(x), that Cone's trial counsel provided inadequate advice regarding whether Cone should testify during the guilt and penalty phases of the trial, was decided adversely to Cone on the merits by the Tennessee Court of Criminal Appeals during the first post-conviction proceeding. Adden. 2, Doc. 4 at 8. Cone did not, however, present this claim to the Tennessee Supreme Court in his application for permission to appeal. Adden. 2, Doc. 5 at 2. He did later raise it as claim 15(n) in the August 1993 petition that was dismissed as procedurally barred. Adden. 3, Doc. 1 at 39.

Claims 40(a), (b), (c), (d), (e), and (f), all relating to trial counsel's alleged ineffectiveness in developing and presenting evidence regarding Cone's mental health and drug use, have never been presented to the state courts. Claim 40(mm), that counsel failed to conduct adequate cross-examination of prosecution witnesses has never

been presented to the state courts. Likewise, claim 40(oo), that counsel inadequately investigated and presented evidence regarding Cone's potential for living a worthwhile life in prison as a means of persuading the jury of the existence of a mitigating circumstances, [sic] has never been presented to the state courts.[5]

Claim 40(pp), that counsel inadequately cross-examined the state's medical experts, and that the State withheld exculpatory evidence with which to impeach them, was held waived on direct appeal of the first post-conviction petition. Adden. 2, Doc. 4 at 6. Petitioner did not include this claim in his application for permission to appeal from that ruling. He did later raise it as claim 15(af) in the August 1993 petition that was dismissed as procedurally barred. Adden. 4, Doc. 1 at 70.

Of the eleven *Brady* claims, only two, claims 39(a) and (i), were even arguably presented to the state post-conviction trial court. Claim 39(a) was raised as claim 20(d) in the June 22, 1989 *pro se* petition. Claim 39(i) was raised in claim 35 in the August 1993 petition. The state court held both claims waived and that decision was affirmed on appeal.

Cone now argues that his procedural defaults should be excused. This argument essentially reduces to two parts: 1) that the 1994 holding by the state post-conviction court that the ineffective assistance grounds were

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[5] Cone has presented the state courts with similar claim 40(ff), that his counsel provided ineffective assistance by failing to request an instruction on this issue. *See* Adden. 4, Doc. 1 at 70. This claim was held procedurally barred under Tenn. Code Ann. § 40-30-112.

"previously determined" constitutes a ruling on the merits of all of his ineffective assistance claims; and 2) that the inadequacy of the state post-conviction procedures precluded him from raising the claims, especially the *Brady* claims. Neither argument has merit.

Cone argues that since he presented these ineffective assistance claims to the state court, but through no fault of his own did not receive a full and fair hearing, he is not barred from presenting them in this petition and is entitled to an evidentiary hearing. This argument misconstrues both the applicable Tennessee law and the standard governing federal habeas review of procedurally defaulted claims.

The State post-conviction trial court set forth the following analysis in its 1994 ruling:

> The Court finds, after a careful and thorough review based upon the entire record including the direct appeal and the first Petition for Post Conviction Relief and the pleadings, affidavits, and briefs of respective counsel[,] that the Second Petition for Post Conviction Relief as amended must be dismissed because the grounds stated in the Petition as amended have been either previously determined or presumptively waived as a matter of law.
>
> The petition fails to state any new grounds that have not already been decided on direct appeal or the First Petition for Post-Conviction Relief. A distinction should be noted between a "ground" and a "factual claim" to support the ground. T.C.A. 40-30-105 states, to wit:

> "Grounds for Relief – Relief under this chapter shall be granted when the conviction is void or voidable because of the abridgement in any way of any right guaranteed by the constitution of this state or the constitution of the United States, including a right that was not recognized as existing at the time of the trial if either constitution requires retrospective application of that right."
>
> T.C.A. 40-30-111 states, to wit: "Scope of hearings" – the scope of the hearing *shall extend to all grounds* the petitioner may have, *except those grounds which the court finds shall be excluded because they have been waived or previously determined,* as herein defined." (Emphasis added).
>
> It is, then, clear that a "ground" is a constitutional right. "Facts" are alleged by the petitioner to support the "grounds". Facts that are merely cumulative or conclusory in nature are non-supportive and will be disregarded.
>
> In the Second Petition sub judice the petitioner employs the word "claim" to describe either a ground or a fact in support of the ground. This is somewhat confusing[,] but obviously an alleged fact is not a constitutional right, and there should be a distinction made in the manner in which the petition is drawn.

Adden. 4, Doc. 1, at 232.

The order then refers to former Tenn. Code Ann. § 40-30-112, which stated:

> When ground for relief is "previously determined" or "waived."

> (a) A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.
>
> (b)(1) A ground for relief is "waived" if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.
>
> (b)(2) There is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived.

Tenn. Code Ann. § 40-30-112 (1990). The court then held:

> Ineffective assistance of counsel. This ground was previously denied on direct appeal and the First Petition for Post Conviction Relief. The claimed factual allegations herein are merely cumulative or have been presumptively waived for failure to present upon direct appeal or the First Petition For Post Conviction Relief.

Adden. 4, Doc. 1, at 233. This determination was explicitly affirmed by the Court of Criminal Appeals.

> In his first post-conviction petition, the appellant presented five factual allegations to support his constitutional claim of ineffective assistance of counsel. His second petition, on the other hand, listed thirty-five separate deficiencies in his trial counsel's performance. The trial court found that ineffective assistance of counsel is a single "ground for relief" as contemplated by the statute, *see* T.C.A. § 40-30-111, and that the issue of ineffective assistance of counsel was therefore previously determined. We agree with the trial court. A petitioner may not relitigate a

> previously determined issue by presenting additional factual allegations. We should not encourage post-conviction petitioners to invent new facts to revive an old issue which was unfavorably decided, nor should we allow petitioners to "sandbag" by reserving factual claims until their second or third petition.

Cone v. State, 927 S.W.2d 579, Adden. 4, Doc. 5, at 5.

Cone argues that this determination that the ineffective assistance ground was previously determined is not a finding of procedural default. This argument is mistaken. From the above decisions, it is clear that when a ground for relief, such a ineffective assistance of counsel, is raised in a Tennessee post-conviction petition, subsequent consideration of factual allegations supporting that ground are barred by the prior presentation of that ground. Cone's argument to the contrary is based on his mistakenly equating the federal habeas term of art "claim" with the Tennessee phrase "ground for relief."

Under § 2254(b), exhaustion is required of every single factual aspect of a claim, not merely of generalized assertions of constitutional error. *Pillette*, 824 F.2d at 497-98. The state court refused to consider the merits of the factual allegations supporting any further Sixth Amendment ineffective assistance ground in the 1993 petition because petitioner had already had an opportunity to present his contention, (whether described as a "claim" or as a "ground for relief"), that his attorney provided ineffective assistance.

By refusing to consider the later factual allegations on the merits, the state courts erected a procedural bar in this federal habeas proceeding, not to every possible

claim of ineffective assistance under the Sixth Amendment, but to the specific claims based on those particular factual allegations. That the state court does not use terms that parallel federal habeas analysis in describing the "claims" asserted in state post-conviction proceedings is irrelevant.[6]

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[6] In an analogous context, the Supreme Court, discussing the state court's obligation to state clearly when it is denying a claim on procedural grounds, noted that:

> [w]e encourage state courts to express plainly, in every decision potentially subject to federal review, the grounds upon which their judgments rest, but we will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim – every state appeal, every denial of state collateral review – in order that federal courts might not be bothered with reviewing state law and the record in the case.

Coleman, 501 U.S. at 739. Similarly, the Fifth Circuit has opined in upholding a procedural default defense:

> [w]e decline today to impose on the [Texas Court of Criminal Appeals] the need to pronounce some shibboleth or incant some magic words guaranteeing safe passage from a holding based on a state procedural bar to an alternative holding on the merits without infecting the opinion with "excuse" and thus dooming it to inadequacy. We likewise decline Amos' invitation to hold that a court's particular choice of words or phrases to reflect the shifting of its focus from a holding grounded on independent state law to an alternative holding based on federal law is dispositive when determining whether that state-law ground is adequate.

Amos v. Scott, 61 F.3d 333, 341 (5th Cir.), *cert. denied*, 116 S. Ct. 557 (1995).

Petitioner argues that by declaring the ground of ineffective assistance "previously determined" the state courts have admitted that his Sixth Amendment claims have been decided on the merits. Petitioner reasons that since he cannot be procedurally barred from raising claims decided on the merits, the state court has decided all of his ineffective assistance *claims* on the merits for purposes of federal habeas review.

The difficulty with petitioner's argument is that it is clear that almost all of the specific Sixth Amendment claims asserted in this petition were not addressed on the merits by the state courts. It is clear that the state courts interpreted the "previously determined" language as a type of procedural bar – a legal determination that certain claims resting on specific factual support should have been presented at the time the petitioner raised similar claims within a broad ground implicating the same constitutional right. Accordingly, for federal habeas purposes, the "previusly determined" category is a type of procedural default as to those claims.

Cone may contend that the state courts should describe all such procedural defaults as a type of waiver. This argument, however, merely amounts to an assertion that the state courts have misapplied state law in creating a procedural barrier to considering the merits of those claims. A federal court cannot refuse to honor an adequate and independent state ruling because it disagrees with the state court's interpretation of state law. Moreover, this argument merely amounts to a disagreement over the terminology used by the state court. Petitioner's attempt to recast state court terminology to make his

claims reviewable misconstrues both state and federal law.

Cone argues also that the Tennessee Supreme Court decision in *House v. State*, 911 S.W.2d 705, 713-14 (Tenn. 1995), issued after Judge Williams denied Cone's second amended state petition, changed the standard for waiver in Tennessee. According to Cone, prior to *House*, Tennessee courts applied a subjective standard for waiver that required a personally knowing and voluntary decision by the prisoner to waive the claim.[7] According to Cone, *House* changed this to find waiver based merely on non-presentation of a claim. This contention misconstrues both prior Tennessee caselaw and *House*.

House simply definitively resolved the issue of whether the phrase "knowingly and understandingly" enunciated a subjective test based only on the petitioner's personal awareness, or an objective test based on what his attorney reasonably should have known. 705 S.W.2d at 713-14. According to the Tennesse [sic] Supreme Court, "[w]aiver in the post-conviction context is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney." 705 S.W.2d at 714. Moreover, it is clear from *House* that the Supreme Court's decision was shaped by the existing Tennessee caselaw, and merely clarified that body of law. Indeed, the *House* decision parallels the result in Cone's state court cases.

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[7] Memorandum in Support of Petitioner's Motion for an Evidentiary Hearing, at 9 (citing *Wooden v. State*, 898 S.W.2d 752, 754 (Tenn. Crim. App. 1994)).

Furthermore, petitioner's argument that prior caselaw enunciated a subjective standard both conflicts with *House*'s analysis of that body of law and is not supported by the single case on which he relies. *See Wooden v. State*, 898 S.W.2d 752, 754 (Tenn. Crim. App. 1994)). In 1992, Wooden, a Tennessee prisoner, filed a third post-conviction petition seeking to invalidate his 1982 rape conviction based on allegedly exculpatory evidence in police files that were unavailable to him until after the decision in *Freeman v. Jeffcoat*, No. 01A01-9103-CV-00086, 1991 WL 165802 (Tenn. App. Aug. 30, 1991), *perm. app. denied*, (Tenn. 1992), made the Tennessee Public Records Law applicable to certain police records. The trial court dismissed Wooden's petition as barred by the former three year statute of limitations on Tennessee post-conviction petitions. *See* Tenn. Code Ann. § 40-30-102 (1990). The appellate court, in *dicta*, observed that "it is doubtful that the defense of waiver would apply" and then remanded the case because the state conceded that the prisoner was entitled to a hearing on whether the statute of limitations would bar claims based on allegedly exculpatory evidence released under the public records law. This case, therefore, does not stand for the proposition that Tennessee courts had adopted and uniformly applied a subjective test for waiver prior to *House*.

Moreover, *Wooden* was not even decided until after Cone filed his various state court petitions. Accordingly, his argument that his reliance on an existing body of state law in filing his petitions should excuse his waiver of his various claims is without merit. His argument that *House* is a retroactive change in Tennessee law is likewise unavailing. In essence, petitioner merely disagrees with

the way in which the Tennessee courts have applied Tennessee's post-conviction procedures to bar review of the merits of the most of his claims. This does not establish that the procedural bar does not exist.

Petitioner's arguments in support of overcoming this procedural bar closely resemble his arguments against its existence. With regard to his ineffective assistance claims, petitioner had the opportunity to raise each of the claims at issue when he first filed a post-conviction petition. Each of the asserted factual claims related to trial counsel's performance were ascertainable from the record when Cone's attorney filed his first post-conviction petition. Cone offers no real excuse for failing to raise those claims in his first post-conviction petition, apart from a rather conclusory argument that his post-conviction counsel was ineffective. It is clear that there is not right to effective assistance of counsel in a state collateral proceeding. *Coleman*, 501 U.S. at 752. Accordingly, an error committed by petitioner's post-conviction counsel is not attributable to the state so as to constitute cause for a default. Rather, according to *Coleman*, the petitioner in a state collateral proceeding "must bear the risk of attorney error that results in procedural default." 501 U.S. at 752-53. Thus, Cone's ineffective assistance claims, except for the [sic] those presented to the Tennessee Supreme Court in the application for permission to appeal the denial of his first post-conviction petition, are barred here.

As to the *Brady* claims, Cone also attempts to argue that those claims were improperly held waived by the state courts. The only claims that were presented to the state courts, however, were conclusory assertions that the

state had generally withheld exculpatory documents, and had withheld documents that might have been useful to impeach prosecution rebuttal witness Ilene Blankman. *See* June 22, 1989 Petition at ¶ 20(d), Adden. 3, Doc. 1 at 43; Aug. 13, 1993 Petition at ¶ 35, Adden. 4, Doc. 1 at 81. Of the eleven instant *Brady* claims on which Cone asserts entitlement to an evidentiary hearing, only claim 39(i) was specifically within the scope of the post-conviction proceeding claims. The other claims, having never been presented to the state courts, are now barred by the state post-conviction statute of limitations.[8] *See Hannah v. Conley*, 49 F.3d 1193, 1194-95 (6th Cir. 1995).

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[8] Tennessee law previously set a three-year statute of limitations for filing post-conviction petitions. *See* Tenn. Code Ann. § 40-30-102 (1990). The period of limitations for Cone's conviction began on the statute of limitations' effective date of July 1, 1986, and expired on July 1, 1989. *State v. Masucci*, 754 S.W.2d 668 (Tenn. Crim. App. 1988) (original statute of limitations began running on effective date of act for all convictions that were final before that date).

In 1995, Tennessee repealed the previous post-conviction statute and replaced it with a completely new statute containing a one-year limitations period. Tenn. Code Ann. § 40-30-202(a) (Supp. 1995). The new statute was effective May 10, 1995. *See* 1995 Tenn. Pub. Acts Ch. 207 § 3, as amended by 1996 Tenn. Pub. Acts ch. 995 § 10 (May 13, 1996). The Tennessee Supreme Court has recently held that the amended statute does not provide a new "one-year window" from the effective date of the act in which every defendant could file a petition. Rather, if the petition would have been barred by the three-year statute provided under the previous act, it is still barred by the 1995 amendments. *See Carter v. State*, 952 S.W.2d 417, 420 (Tenn. 1997). Cone filed his second state post-conviction petition on June 16, 1989, fourteen days before the post-conviction statute of limitations expired. The statute was tolled during the time the

It appears that petitioner contends that he can demonstrate cause for this procedural default because he did not have access to the documents supporting the defaulted claims until he utilized federal discovery procedures in this habeas case. This contention is without merit. The petition admits that the documents from claims 39(a), 39(i), and 39(j) were all made available to Cone during the second post-conviction proceeding. *See* Adden. 4, Doc. 1 at 104 (State's response to request for discovery during post-conviction proceedings, stating "The original file has already been made available to counsel for petitioner."). Moreover, the petitioner admits that these documents were available during the second proceeding. *See* Petition at 13, n.7 (noting 1992 change to Tennessee public records law making records available).

The argument that the state's post-conviction procedures were inadequate to provide Cone with the opportunity to present those claims also ignores Cone's own admission in his motion for rehearing before the Tennessee Supreme Court in his second post-conviction proceeding that the *Brady* evidence has been available to him since 1992. *See* Adden. 4, Doc. 12 at 1-2. His amended post-conviction petitions were not filed until August of 1993. Adden 4, Doc. 1 at 64. Yet, of the specific *Brady* claims raised in this case, only one was ever even arguably raised before the state courts. Cone's state post-conviction counsel apparently never utilized the Tennessee Public Records Act procedures to obtain the information,

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second petition was pending, and expired, at the latest, fourteen days after the March 4, 1996 denial of Cone's petition for rehearing in the Tennessee Supreme Court.

or did not consider the evidence to be of value if they did, in fact, obtain it. As discussed above, my mistakes made by Cone's state post-conviction counsel in handling that state petition cannot constitute cause under *Coleman*. By failing to present claims 39(a) and 39(j) to the state court, Cone procedurally defaulted those claims. He cannot demonstrate cause for this default.

Claim 35 in Cone's amended second post-conviction petition was held waived by the state court. This claim arguably parallels claim 39(i) in this petition. Cone asks this court to declare that the claim was not actually waived because he had no opportunity to uncover the facts supporting the claim during the *first* post-conviction petition. This contention is without merit, however, because of the conclusory manner in which Cone asserted the claim during the second post-conviction petition. Despite the admitted availability of the materials from the prosecutor's file, Cone never relied on any specific document, and never made any specific *Brady* claim before the state court. He therefore failed to establish any basis for rebutting the statutory presumption of waiver of this claim. Accordingly, this claim is also procedurally defaulted, and Cone has failed to establish cause for this default.

Moreover, even if Cone's argument amounted to cause for this default, he cannot establish any prejudice based on the withholding of the information related to Blankman's testimony. These six items of information were:

1) A letter from the prosecutor to Blankman confirming their earlier conversation and providing her statement;

2) A letter from the prosecutor to Blankman confirming her court appearance and again providing the statement;

3) An F.B.I. report describing an event *after* the trial in which Blankman, while eating at a public restaurant, did not respond when someone accused her of lying;

4) The presence in the F.B.I. file of a copy of a report by Dr. Jonathan Lipman;

5) The prosecutor's notes of a pre-trial interview with Blankman. These notes allegedly do not contain any reference to the statements Blankman afterwards made during her rebuttal testimony about her observations of Cone;

6) A letter from the prosecutors thanking Blankman for her testimony.

Petition at 16-17. None of these items fall within *Brady*, which requires the government to disclose to a criminal defendant evidence that is both favorable and material to guilt or punishment. *See United States v. Presser*, 844 F.2d 1275, 1281 (6th Cir. 1988) (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987)). *See also United States v. Bagley*, 473 U.S. 667, 682 (1985); *United States v. Agurs*, 427 U.S. 97, (1976).

Items 3 and 6 concern post-trial events, and do not tend to prove any fact that would establish Cone's innocence. Items 1 and 2 also do not tend to prove any fact that is both favorable to Cone and material to his guilt or punishment. Item 5 consists not of information, but an absence of information. Cone attempts to turn this void into positive exculpatory evidence. This contention is

frivolous. Information is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial." *Id.* at 678. That Blankman's in-court testimony is absent from the prosecutor's pre-trial notes does not undermine confidence in the outcome of petitioner's trial, thus those notes are not material.

Moreover, to the extent that this document would have been useful to establish that Blankman had not previously told anyone the facts to which she testified at trial, this evidence was admitted at trial through the cross-examination of Blankman and through the cross-examination of officer Roby. *See* Trial Transcript at 1896-1905, 1943-45. This document would not have resulted in any appreciable further impeachment of Blankman's testimony and was, therefore, not material to Cone's guilt or punishment under *Bagley* and *Brady*. As this document was not material, Cone cannot demonstrate the prejudice necessary to overcome a procedural default of this claim. Alternatively, under § 2254(b)(2), this claim is completely devoid of merit, regardless of issues of exhaustion or procedural default.

As to the fourth item, the presence in the F.B.I. file of Dr. Lipman's report is not only not exculpatory, but is not even probative of anything. Cone argues that the presence of Lipman's report:

> demonstrat[es] that both Ilene Blankman as well as F.B.I. agent Flynn, both of whom testified against Mr. Cone, had been informed about the evidence presented by the defense at trial and what they were specifically being called to rebut, thus demonstrating that such witnesses were not disinterested, truthful witnesses, but specifically collaborating with the prosecution to present facts against Mr. Cone.

Petition, ¶ 39(I)(iv) at 17. This claim is entirely speculative and does not establish that the prosecutors withheld exculpatory information from the defense. Dr. Lipman was one of the experts who testified for the defense. His report on Cone's condition would naturally appear in the F.B.I.'s file. Its presence does not tend to make it more likely that the prosecution engaged in misconduct with regard to Blankman's testimony. As noted, Cone's trial counsel subjected Blankman to searching cross-examination in an attempt to demonstrate that her rebuttal testimony was a last-minute fabrication. This claim is simply an attempt to create a claim where none exists.

The evidence of Cone's guilt was overwhelming, and the material evidence that he was acting under the influence of amphetamine psychosis was, and continues to be, virtually nonexistent.[9] The allegedly exculpatory information on which he relies would not have cast any doubt

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[9] In this regard, the court should mention briefly that the eight items of supposed *Brady* material on which Cone relies in

on the testimony of Blankman. As to this claim also, Cone cannot establish cause for his procedural default and cannot establish a constitutional violation, even apart from that default.

¶ 39(a) are not exculpatory either. These items consist primarily of copies of fugitive alerts provided to various law enforcement agencies throughout the country during the hunt for Cone. They mention that Cone was a "hearvy drug user". Cone argues that this contradicted prosecution witnesses who testified that they did not observe Cone use drugs, did not observe any needle tracks on his body, and observed that his behavior was inconsistent with a person under the influence of any drugs. Agent Flynn testified that Cone admitted to using cocaine, Dilaudid, and Demerol. Flynn did not testify that Cone said anything about amphetamine abuse. Given that the issue at trial was not whether Cone had ever abused any drugs (he clearly had), but whether he was out of his mind on amphetamines at the time of the murders, this evidence does not devastate the state's case or even credibly impeach the state's witnesses. Cone's claims in this regard are exaggerated and devoid of merit. To the extent that the alerts were remotely relevant, they might have tended to prove that the police were initially cautious regarding the characteristics of a person who had committed several heinous crimes. Apparently, Cone's father made mention to a police officer during the initial investigation of Cone's *prior* drug use. Seemingly out of an abundance of caution, the police included this possible characteristic in their alert. Clearly, the evidence as subsequently developed during the investigation established that Cone's drug use was irrelevant to his commission of these offenses. Furthermore, Cone's reliance on the number of such alerts is misplaced. The probative value of each of these irrelevant items is not increased by their accumulation. Finally, Cone cannot establish that these items are actually not provided to him during the original criminal proceedings because his trial counsel is deceased and his file is not available.

Claim 65 in Cone's habeas petition, regarding his presence at counsel table, is also defaulted. Cone does not offer a reason for his failure to raise this claim in his first *post-conviction* petition, nor any basis for avoiding a procedural default. Finally, with regard to all of the procedurally defaulted claims, Cone has not demonstrated that he is actually innocent, either of the original crimes of murder, or of the death penalty. He thus cannot obtain review of those defaulted claims.

The remaining claims are not procedurally defaulted, and were decided on the merits by the state courts. These claims bear repetition here:

1) 40(h) (also (qq)) – Cone's trial counsel provided ineffective assistance when he failed to present any proof in mitigation of the death penalty.

2) Claim 40(i) – Cone's trial counsel provided ineffective assistance by not making any closing argument at the penalty phase of the trial.

3) Claim 39(j) (also 41) – Cone was deprived of due process by the prosecutor's guilt-phase closing argument that jurors should reject his drug-user defense because the amount of money in the car tended to show that he was a drug seller, not a drug user, even though the prosecutors knew the money came from an earlier grocery store robbery.

4) Claim 61 – electrocution is cruel and unusual punishment.

Dealing with the last claim first, this claim is without merit and does not require an evidentiary hearing.

> Electrocution has never been found to be cruel and unusual punishment by any American court. *See, e.g., In re Kemmler,* 136 U.S. [436,] 443-44 [1890]; *Ingram v. Ault,* 50 F.3d 898 (11th Cir. 1995); *Felker v. Turpin,* 101 F.3d [95,] 97 [(11th Cir.), *cert. denied* 117 S. Ct. 450 (1996)]; *Porter [v. Wainwright],* 805 F.2d [930,] 943 n. 15 [(11th Cir. 1986), cert. denied, 482 U.S. 918, 107 S. Ct. 3195, 96 L.Ed.2d 682 (1987)]; *Glass v. Louisiana,* 471 U.S. 1080, 105 S. Ct. 2159, 85 L.Ed.2d 514 (1985) (Brennan, J., dissenting from denial of certiorari) ("such claims have uniformly and summarily been rejected"). No legislatively authorized method of execution in the United States is outlawed in any jurisdiction by any currently-effective court decision. [*Gomez v.*] *Fierro,* 117 S. Ct. [285,] 285 [(1986)]; *Rupe v. Wood,* 863 F. Supp. 1307 (W.D. Wash. 1994), *vacated as moot,* 93 F.3d 1434 (9th Cir. 1996).
>
> The very practice of electrocution has been upheld by other courts within the past year, and there is no argument even plausible that there are differences in the level of "evolving decency" among the different circuits or states of the union, or over the last very few years.

In re Sapp, 118 F.3d 460, 464 (6th Cir.), *cert. denied* 117 S.Ct. 2536 (1997). *Accord, Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 464 (1947) (holding that subjecting a convict to electrocution a second time after a first attempt at execution failed was not cruel and unusual punishment), *Williams v. Hopkins,* 130 F.3d 333, 337 (8th Cir. 1997) (following *Sapp* and rejecting § 1983 claim that electrocution is cruel and unusual punishment); *Ingram v. Ault,* 50 F.3d 898, 900 (11th Cir. 1995); *Johnson v. Kemp,* 759 F.2d 1503, 1510 (11th Cir. 1985) ("The contention that death by

electrocution violates the Eighth Amendment is frivolous."); *Sullivan v. Dugger*, 721 F.2d 719, 720 (11th Cir. 1983) (denying motion for a TRO alleging that "the carrying out of appellant's death sentence by means of electrocution is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments"); *Spinkellink v. Wainwright*, 578 F.2d 582, 616 (5th Cir. 1978) (following *Klemmer* and finding cruel and unusual punishment argument without merit).

In deciding whether a particular form of capital punishment is unconstitutionally cruel and unusual, the federal courts "look to objective factors to the maximum extent possible. Among these factors are statutes passed by society's elected representatives. We presume that a punishment selected by a democratically elected legislature is constitutionally valid." *Campbell v. Todd*, 18 F.3d 662, 682 (9th Cir.) (holding hanging not cruel and unusual), *rehearing en banc denied*, 20 F.3d 1050 (9th Cir.), *cert. denied*, 511 U.S. 1119 (1994). Given that the Tennessee legislature has declared electrocution to be the form of capital punishment in this state, that capital punishment is not, in and of itself, cruel and unusual, *Gregg v. Georgia*, 428 U.S. 153 (1976), that many other states also impose death by electrocution, and that no court has ever held electrocution inherently cruel and unusual, this claim is legally without merit.

Furthermore, the court has reviewed the scientific paper on which Cone relies, Exh. C to Memorandum in support of Petitioner's Motion for Evidentiary Hearing. This paper establishes that electrocution is painful. What the paper fails to mention, however, is any estimate of how long a person remains conscious and could actually

experience pain while being executed in an electric chair. The paper disputes, *Id.* at 30, the contention by the chair's manufacturer that unconsciousness generally occurs in 1/240th of a second, but does not attempt to provide a correct figure. Regardless of the intensity of the pain inflicted by electrocution, a duration of 1/240th of a second cannot be said to be cruel and unusual, and petitioner has not carried his burden to demonstrate that he will survive for any longer period of time.

Most importantly, § 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Given the state of the law as discussed above, it cannot be said that the Tennessee Supreme Court's rejection of this claim on direct appellate review "involved an unreasonable application of clearly established Federal law." Accordingly, this claim is without merit. Petitioner's third claim is also without merit. Cone contends that he was

deprived of due process at the guilt phase by the prosecutor's argument that the jury should conclude that Cone was a drug seller instead of a user based on the money found in his vehicle, even though the prosecutor knew the money originated from Cone's robbery of a grocery store. This claim exaggerates the importance of the prosecutor's statement and ignores the other evidence that Cone was indeed involved in selling drugs. This claim was raised and fully addressed during Cone's first post-conviction proceeding. At trial, the prosecution established that Cone's car was found to contain thee hundred thirty-nine dollars in cash in his wallet, Tr. at 1500, a huge quantity of drugs, so far beyond what could arguably be for one person's use that it required four pages of the trial transcript to list, Tr. at 1506-10, one thousand nine hundred thirty-two dollars in cash removed from the same suit bag containing the drugs, Tr. at 1512, a list of drugs, Tr. at 1513, and additional loose change, Tr. at 1513. The prosecutor argued at the closing of the guilt phase that the nineteen hundred dollars was evidence that Cone had been selling drugs rather than using them. The state court on post-conviction review held this remark to be improper but harmless. In particular, the state court noted that the primary evidence that Cone was engaged in selling drugs was the large quantity of drugs in the vehicle. Adden. 2, Doc. 4 at 4.

Under § 2254(d), Cone cannot establish that this decision involved an "unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States." A review of the evidence in the record supports that Cone's out-of-his-mind-on-amphetamines defense was not rejected by the jury

because the prosecutor accused him of being a drug seller, but because he lacked credible evidence that he had in fact abused amphetamines during any period close to the murders. The prosecution's arguments regarding these funds were simply too remote from the real issues in this case to have affected the jury's deliberations. As this claim is without merit, there is no need for an evidentiary hearing to consider additional evidence. Accordingly, this claim is DISMISSED.

Cone's Sixth Amendment argument based on his attorney's failure to offer proof of mitigation also does not require a hearing. As Cone has procedurally defaulted his claims based on counsel's alleged failure to investigate and develop proof of mitigation, this claim must be evaluated based on the mitigating evidence available to counsel at the time he made the decision. The Court of Criminal Appeals, on review of the first post-conviction petition, explained that counsel made a series of reasoned tactical and strategic decisions regarding the proof of mitigation available to him. Of that proof, the two expert witnesses had already testified, and counsel determined there was no point to presenting cumulative testimony.

Counsel determined that Cone's mother was an ineffective witness whose exposure to further cross-examination would harm her son's case more than it would help. Counsel further determined that testimony by other potential witnesses about Cone's past would merely have revealed further criminal activity of which the jury was unaware. As the state court found, "[t]here is nothing in the record to show that the testimony of these witnesses would have benefited the defense." Adden. 1, Doc. 4 at 8.

Cone does not present any facts in this petition to refute this conclusion. Moreover, it is clear that all of the legitimate mitigating proof available to Cone was introduced during the actual trial. Cone's attack on this proposition is again based on procedurally defaulted claims and allegations.

Strickland v. Washington, 466 U.S. at 687, establishes the standard for an ineffective assistance claim. A petitioner must show:

1. deficient performance by counsel; and
2. prejudice to the defendant from the deficient performance.

See id. at 687.

A prisoner attacking his conviction bears the burden of establishing that he suffered some prejudice from his attorney's ineffectiveness. *Lewis v. Alexander*, 11 F.3d 1349, 1352 (6th Cir. 1993); *Isabel v. United States*, 980 F.2d 60, 64 (1st Cir. 1992). "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant." *Strickland*, 466 U.S. at 697. If a reviewing court finds a lack of prejudice, it need not determine whether, in fact, counsel's performance was deficient. *Id.* at 697.

To demonstrate prejudice, a movant under § 2255 must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Additionally, however, in analyzing prejudice,:

> the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.

Lockhart v. Fretwell, 506 U.S. 364, 368 (1993) (citing *United States v. Cronic*, 466 U.S. 648, 658 (1984)). "Thus an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Fretwell*, 506 U.S. at 369.

In this case, Cone has failed to demonstrate any prejudice from the failure of his trial counsel to introduce any then-available evidence at his sentencing hearing. Cone's argument that counsel's decision harmed him is based largely on speculative assertions about the effect of further evidence on the jury's deliberations, and on even more speculative assertions about what might have happened if counsel had investigated other evidence of mitigation. The latter category of claims is procedurally barred, however, and Cone's belated attempts in this court to produce mitigating evidence is of no avail.

The state appellate court, in ruling on the merits of this claim, found that the supposed mitigating evidence counsel did not introduce would have had no affect on the jury's verdict. Cone has failed to allege any facts or arguments that would undermine confidence in the reliability of the jury's verdict, and has thus failed to demonstrate a reasonable probability that the proffer of the withheld testimony would actually have affected the

jury's decision. Moreover, he has failed to carry his burden to demonstrate that the verdict was fundamentally unfair or unreliable. Nor has he demonstrated that the state court's decision did not comply with the requirements of § 2254(d)(1).

This case does not involve the type of total abdication of representation condemned in *Austin v. Bell*, 126 F.3d 843, 849 (6th Cir. 1997). Here, unlike *Austin*, counsel had already introduced some mitigating evidence, and his rejection of other evidence was based on specific analysis of the tactical effect of that evidence. This is unlike the situation in *Austin*, in which counsel simply decided that any efforts would be useless. That counsel miscalculated the jury's ultimate verdict does not turn otherwise unreviewable strategic decision-making into deficient performance. In evaluating an ineffective assistance claim, the court should not second-guess counsel's tactical decisions. *Adams v. Jago*, 703 F.2d 978, 981 (6th Cir. 1983).

Accordingly, Cone has failed to demonstrate that the state court's rejection of this Sixth Amendment claim "involved any unreasonable application of clearly established Federal law." This claim is, therefore, without merit. As Cone cannot surpass the threshold requirement of § 2254(d), he is not entitled to an evidentiary hearing under § 2254(e). This claim as to counsel's failure to introduce mitigating evidence is DISMISSED.

Similarly, Cone has failed to demonstrate any Sixth Amendment claim based on his counsel's decision to forego a closing statement during the sentencing phase. The state court found that counsel considered that the

closing argument made by one of the state court prosecutors was not so damaging as to require a response. Defense counsel considered the risk of a persuasive final response from the other more experienced state prosecutor to be so great that the defense would be better off relying on the opening statement counsel gave at the beginning of the sentencing phase. Cone fails to offer any basis for disputing the state court's determination that this decision was a tactical choice to foreclose rebuttal argument by the prosecution.

A review of the closing remarks by the first prosecutor confirm that they were relatively straightforward – simply a recitation of the existence of four aggravating circumstances. Trial Trans. at 2144-47. There was no dispute that three of these circumstances definitely existed,[10] and Cone presents no argument that any statement counsel might have made would have persuaded the jury to give greater consideration to the evidence of mitigation introduced during the guilt phase. The state court's decision was a reasonable application of Sixth Amendment standards to the facts presented in the state court post-conviction proceeding.

Cone now contends that he should be given a hearing on the ineffective assistance claims because, after the first

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[10] On direct review the Supreme Court held the fourth factor, knowingly creating a great risk of death to two or more people other than the murder victims, was not supported by the evidence because the robbery and assaults with intent to murder were not committed during the murders of the Todds. The court nevertheless held this error to be harmless beyond a reasonable doubt.

post-conviction proceeding, his original trial counsel suffered from a mental disorder that apparently culminated in his committing suicide. He offers no evidence beyond speculation, however, that this condition affected either counsel's original trial performance or the testimony he offered during the post-conviction proceeding. He has not offered any actual evidence of either deficient performance or prejudice affecting the fairness and reliability of Cone's trial or death sentence. Cone has not offered any evidence to support the conclusory allegation that counsel was incapable, during the first state court post-conviction proceeding, of remembering the basis for his trial decisions. Cone fails to point to any part of the trial record that contradicts counsel's post-conviction hearing testimony or any part of the record that is inconsistent with that testimony. Cone does not point to any portion of the post-conviction hearing transcript that shows that counsel acted or spoke as if he was incompetent, or to any references that would support an argument that counsel was simply fabricating his testimony.

Finally, these contentions are an attempt to resurrect the procedurally defaulted claims of inadequate investigation and preparation. The argument that counsel's tactical decisions regarding the penalty phase of the trial were deficient and prejudicial to Cone are based on retrospective research and speculation about the effect further evidence might have had on the jury. Additionally, most of these contentions are rooted in claims that were not presented during the first post-conviction proceeding. In effect, Cone is complaining, again, about the quality of his representation during that proceeding. As discussed

above, *Coleman* forecloses such claims, however disguised. The claims are without merit, and are dismissed.

Accordingly, as the above claims are all either procedurally barred or correct under § 2254(d)(1), disposition of those claims without an evidentiary hearing is proper. Rule 8(a), Rules Governing Section 2254 Cases in the United States District Courts. Petitioner's motion is, therefore, DENIED, and those claims are hereby DISMISSED.

Cone devoted considerable argument to his contention that he is entitled to an evidentiary hearing under *Townsend v. Sain*, 372 U.S. 293 (1963), and *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). As the Court has determined that the claims are without merit, and as Cone has not established that any decisions involved an unreasonable application of clearly established federal law, he is not entitled to an evidentiary hearing in any event. The Court, therefore, need not address the issue of whether or how the standards enunciated in *Townsend* and *Keeney* apply after the enactment of new 28 U.S.C. § 2254(e).

IV. CONCLUSION

For the reasons set forth above, petitioner's motion for an evidentiary hearing is DENIED, and the claims addressed in his motion are hereby DISMISSED.

IT IS SO ORDERED this 15 day of May, 1998.

/s/ Jon Phipps McCalla
JON PHIPPS McCALLA
UNITED STATES DISTRICT JUDGE

[Table Omitted In Printing]

STATE of Tennessee, Plaintiff-Appellee,

v.

Gary Bradford CONE,
Defendant-Appellant.

Supreme Court of Tennessee.

Jan. 23, 1984.

William M. Leech, Jr., Atty. Gen. and Reporter Gordon W. Smith, Asst. Atty. Gen., Nashville, for plaintiff-appellee.

John C. Dice, April Ferguson, Memphis, for defendant-appellant.

OPINION

HARBISON, Justice.

Appellant was convicted of murder in the first degree and murder in the perpetration of a burglary in connection with the homicides of an elderly couple, Shipley O. Todd and his wife Cleopatra Todd, in Memphis on August 10, 1980. He was also convicted of three charges of assault with intent to commit murder in the first degree upon three other persons and of robbery by use of deadly force upon a fourth. All of these offenses were shown to have occurred on August 9, 1980.

We have reviewed the evidentiary record and the numerous issues presented on appeal by counsel for appellant. We find none of these issues sufficient to warrant reversal of any of the convictions, and all of them are affirmed.

Appellant was sentenced to life imprisonment for the armed robbery and for a term of years upon each of the

assault charges. He was given the death penalty for each of the two murders. The record clearly warrants imposition of the death penalty under the circumstances of these homicides, and it could in no sense be deemed to be disproportionate, in our opinion.

The homicides were the climax of a series of criminal episodes commencing on August 9, 1980, when appellant robbed a jewelry store in Memphis of approximately $112,000 worth of expensive watches, rings and other jewelry. The manager of the jewelry store gave a description to the police, and an officer in an unmarked cruiser saw appellant driving his 1972 gray oldsmobile a short time after the robbery. He followed appellant at a normal speed, but the latter, apparently becoming alarmed, accelerated in an effort to escape. A high-speed chase ensued through mid-town Memphis and into a residential neighborhood. There appellant abandoned his automobile. He shot one of the police officers who attempted to arrest him, shot a citizen, John Clark, who challenged him, and drew a gun on a third citizen, demanding that the latter give appellant his automobile. The owner of the automobile fled, and appellant snapped his pistol several times, his ammunition having been exhausted. He not only threatened the owner of the automobile, but apparently was snapping his pistol at a police helicopter which was flying over the area to assist in his apprehension. Appellant eluded police during the afternoon of August 9, a Saturday. Early on the next morning, in the same neighborhood, he appeared at the door of a resident, Lucille Tuech. When she refused him admittance to make a telephone call, he drew a pistol on her. Later that afternoon he entered the home of Mr. and Mrs. Todd,

which was located a very short distance from the apartment house where Ms. Tuech lived and in the same residential area where the other shootings had occurred.

Mr. Todd was 93 years of age; his wife was 79. She had gone to church on the morning of August 10 and had returned. Apparently she had eaten a meal. At some time in the afternoon appellant entered the home, breaking a latch on the rear door. The bodies of both victims were found horribly mutilated and cruelly beaten three days later upon investigation instituted by anxious relatives. Appellant's fingerprints and hair samples were found in the home, which had been ransacked, and he apparently was able to steal enough money or other valuables from the home to fly from Memphis to Florida, where he appeared at the home of an acquaintance on August 12.

Appellant from the beginning has admitted committing the homicides and the other crimes involved. The only defense interposed on his behalf was that of insanity, or lack of mental capacity, due to drug abuse and to stress arising out of his previous service in the Vietnamese war, some eleven years prior to the events involved in this case. This proved to be a tenuous defense, at best, since neither of the expert witnesses who testified on his behalf had ever seen or heard of him until a few weeks prior to the trial. Neither was a medical doctor or psychiatrist, and neither had purported to treat him as a patient. Their testimony that he lacked mental capacity was based purely upon his personal recitation to them of his history of military service and drug abuse. A psychiatrist and a psychologist examined him upon orders of the trial court, and neither of them found any evidence of a stress syndrome or of excessive drug abuse.

Lay witnesses who saw him at or about the time of the homicides contradicted his statements to his expert witnesses as to the degree and extent of his drug abuse. The jury was clearly warranted in finding that appellant was not insane at the time of the criminal episodes involved here on August 9 and August 10, 1980.

The jewelry store robbery was apparently planned well in advance. On August 8, 1980, appellant stole a Tennessee license plate from a Memphis resident. He apparently taped this over the Arkansas plate on the rear of his vehicle, but later it was found inside his automobile after he had removed it. He changed clothes after the robbery and was dressed in a different costume at the time of the subsequent police chase. After the murders he shaved his beard and altered his appearance considerably. He had capacity obviously to book plane flights from Memphis to Birmingham and thence to Florida. A lady acquaintance with whom he stayed in Florida and who had known him for several months prior to the crimes involved here testified that he had not used drugs excessively during the times when he was with her, nor did he appear to be experiencing withdrawal symptoms or using drugs when he returned to Florida on August 12, 1980. A police officer who examined him in Florida and took hair samples from his body said that there were no visible needle marks or other external evidences of drug abuse on appellant's body.

All of the items taken by appellant in the jewelry store robbery were found in his abandoned automobile, together with some $2,400 in cash and a very large quantity of contraband controlled substances.

We do not deem it necessary to dwell further upon the factual background of the case, because the evidence is overwhelmingly sufficient to sustain the convictions on all of the charges. Indeed, as previously stated, appellant has admitted guilt of all of them, but has denied responsibility solely on the basis of lack of mental capacity. It was stipulated that there was no issue of self-defense in connection with the deaths of the Todds, both of whom were repeatedly beaten about the head until they died. Defensive wounds appeared on the arms and hands of both of them, and the bodies had apparently been moved or dragged to points inside the house where they would not be visible from either the front or the rear door. Appellant made a telephone call from the residence of the Todds to his sister in Chicago at 3:45 on August 10, 1980. In addition he gave the following information to one of his expert witnesses in undertaking to explain the homicides:

> "He described that he was at their house with the agenda of getting cleaned up, getting fed, so that he could flee the area. And in the course of his time there they ceased to cooperate with him, and he started to try to control them physically to cooperate, and that's all the detail I have. He has no more recollection of specifics after that.
>
> "Q. But there's no question that he told you that he did kill those two old people?
>
> "A. That's what he told me, yes.
>
> "Q. And they ceased to cooperate with him, is that what you said he told you. Right?

> "A. They became frightened, and that was not what he wanted them to do."

Other testimony indicated that the police had combed the area in which the Todds lived and in which the other shootings had occurred on Saturday afternoon, and that appellant had apparently concealed himself from them. They had even used tear gas on an abandoned residence in an effort to find him. There can be no question but that his killing of the Todds was in furtherance of his effort to escape from the crimes which he had committed on the previous day.

Appellant was thirty-three years of age. He was an honor graduate of the University of Arkansas and shortly before the events in question here had been accepted for admission into law school, scoring in the ninety-sixth percentile on a law school admission test. He had served in the armed forces from 1966 through 1969, and had one year's service in Viet Nam as a supply sergeant. He had received a bronze star for his service there and had been honorably discharged from the army. He went to college after his discharge. In 1972, however, after graduating from college, he was convicted of three separate armed robberies in Oklahoma, these covering a period from December 1971 through May 1972. He had been imprisoned in Oklahoma until the latter part of 1979. He had then returned briefly to his home in Arkansas and had gone to Hawaii for a time. The vehicle which he was driving on August 9, 1980 had originally been registered in his name, but was registered in the name of his mother on that date.

Appellant offered the testimony of two witnesses in support of his defense of lack of mental competence.[1] The first of these was Dr. Matthew Jaremko, a clinical psychologist at the University of Mississippi. He had interviewed appellant on two occasions for a total of about six hours, beginning in February 1982, less than two months prior to the trial. It was the opinion of Dr. Jaremko that appellant was suffering from post-traumatic stress disorder as a result of his experiences in Viet Nam, and that upon this was superimposed a serious drug-abuse disorder. Dr. Jonathan Lipman, a neuro- pharmacologist, testified that appellant, in his opinion, suffered from "chronic amphetamine psychosis" as a result of serious drug abuse. As previously stated, neither of these witnesses had ever known or treated appellant prior to the early part of 1982, and both of them based their testimony entirely upon what he told them as to the extent of his ingestion or injection of drugs. Not only was the weight of their testimony a question for the jury, but appellant's known pattern of conduct immediately before and immediately after the events in question here raised serious doubts as to the accuracy of their opinions, because he did not appear to be seriously under the influence of or experiencing withdrawal from drugs according to the testimony of several witnesses who saw him during August 1980. In addition, as previously pointed out, the State offered two witnesses whose qualifications equalled or exceeded those of appellant's experts, and neither of

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[1] Other than claiming his constitutional right to remain silent, appellant did not testify at either the guilt or the sentencing phase of the trial.

the State's expert witnesses found any basis for an insanity defense.

Counsel for appellant, who conducted the defense and has pursued the appeal in this case most diligently, has raised numerous issues for our consideration. After carefully considering them, however, we are of the opinion that none of them warrant our interference with the jury verdict and the judgment of the trial court rendered thereon. In addition to overruling the issues presented as to the sufficiency of the evidence, we will comment briefly upon the other issues raised on appeal, although not necessarily in the order presented in the briefs.

Appellant has assigned error upon the failure of the trial court to grant individual *voir dire* of a juror, Floreine C. Dragon. This juror indicated that she was taking some medication at the time of the trial. Defense counsel requested that the other prospective jurors be sequestered so that he could examine the juror individually and avoid embarrassing her. The trial court denied this request, and we are of the opinion that this ruling was within his discretion. There was nothing necessarily embarrassing in questioning the juror about her medication as a part of the group. She apparently served on the jury without difficulty or incident. At one point during the trial she was questioned privately, as were other jurors, concerning some newspaper materials which had been furnished to the jury during a weekend recess. Nothing in her testimony at that time or in any post-trial affidavit indicates that she was not competent to serve as a juror or that appellant was prejudiced in any way by the ruling of the trial judge with respect to her *voir dire* examination.

Error is also assigned on the *voir dire* examination of five other persons who were excused by the trial judge for cause when they expressed irrevocable and unconditional refusal to consider the imposition of the death penalty. We have reviewed carefully the examination of each of these prospective jurors, and in our opinion the trial judge acted properly in excusing them. *See Houston v. State*, 593 S.W.2d 267, 272 (Tenn.1980).

During a weekend recess of the lengthy trial, a court officer furnished members of the jury with a Sunday newspaper. He had clipped from this all news stories which he observed concerning the trial and its incidents. However, in the sports section, there was a story about one of the witnesses who had been shot by appellant on August 9, 1980. In a magazine story there was also a brief reference to a double murder of an elderly couple in mid-town Memphis. This was merely a passing reference which did not refer to the names of the victims or of appellant.

The trial judge conducted an individual examination of the jurors on their exposure to the magazine article. Only one juror had even read that article, and none of the jurors had read anything in the newspaper which they associated in any way with the case on trial. They were not separately examined about the article on the sports page, but apparently none of them had taken note of it or were affected by it in any way. In all events, that article simply recounted the testimony of a witness, John Douglas Clark, who had testified on the previous Friday. It contained nothing with which the jurors were not already fully familiar. We find no error in connection with

the ruling of the trial judge and agree that a mistrial was not justified upon the basis of these news items.

A number of issues are presented concerning rulings made by the trial judge during the course of the trial. One of these involved an objection by counsel for appellant to the cross-examination of Dr. Lipman. That witness testified that all he knew about appellant's history was what appellant had told him. He admitted on cross-examination that if appellant had given different information to other doctors, this might affect his opinion. Apparently appellant did give other information to the State's expert witnesses, or they obtained other information independently, because their opinions differed greatly from that expressed by Dr. Lipman. The cross- examination was properly permitted. Further, the trial judge properly allowed the expert witnesses called by the State to testify concerning statements made to them by the accused with reference to his use of drugs. Neither witness quoted any incriminating statements by appellant, insofar as the facts of the case were concerned. At two points in the record references were made to the fact that these witnesses had examined appellant upon orders of the court. We find no statement, however, that they were "the Court's doctors," as alleged in the brief of appellant. The issue is without merit.

Equally without merit is the contention that the trial judge permitted three witnesses to testify for the State on rebuttal. It was insisted by appellant that these witnesses should have been offered during the State's presentation in chief. All of them, however, directly and sharply contradicted the contention of appellant that he was "out of his mind" as a result of drug abuse on the weekend in

question, and that he was experiencing severe and extreme symptoms of drug withdrawal after the crimes for which he was on trial.

Error is assigned upon the admission of photographs of the homicide victims. The trial judge excluded all photographs which showed the facial features of the two deceased persons in any detail. The photographs which were admitted simply showed portions of the house, and in some of them the bodies of the victims could be seen, but none of the photographs was gruesome nor did the prejudicial effect of any outweigh its probative value.

Counsel for appellant insists that the prosecuting attorney made an improper reference to a motion *in limine* which had been ruled upon by the trial judge. That motion involved some of the photographs just discussed. When counsel for the prosecution reached the point in trial when he wished to introduce photographs of the Todd residence, he mentioned to the court that he was coming to material which had been the subject of the pre-trial motion. At that point the judge excused the jury. The conduct of counsel for the prosecution was entirely proper. There was no attempt to suggest to the jury what the subject of the pre-trial motion had been or the ruling of the court thereon. The assignment is overruled.

There are numerous other assignments in which counsel for appellant insists that the prosecuting attorneys were guilty of improper conduct in the presence of the jury. We have examined each of these, and find none of them to warrant reversal. One improper remark was made, as to which the trial judge offered to give curative instructions to the jury. Counsel for appellant declined

these. In our opinion no remarks made during the course of the trial concerning counsel for either side could possibly have affected the results. The same is true with respect to alleged improper argument by counsel for the State. One or two brief comments were made in the heat of argument which probably should not have been made, but these either were not objected to at the time or were legitimate inferences to be drawn from the proof. We accordingly overrule issues two, three and six as presented in appellant's brief.

We find no merit to the assertion by appellant that the indictments in this case were insufficient and find no error with respect to the jury instructions. Likewise we find without merit the insistence that the State failed properly to produce witness statements for use by counsel for appellant on cross-examination. The State produced all of the statements which it had. The reference by counsel for appellant simply has to do with some summaries of witness interviews made in a general police report. There is no showing that any of the witnesses referred to ever saw or adopted any of the materials contained in this report. Issues seven, fourteen and fifteen are overruled.

We find no substance to the contention that the State was guilty of improper or selective prosecution in this case by not offering a life sentence to the accused in pretrial negotiations. We also overrule four issues addressed to the alleged invalidity of the death penalty in this state. All of these contentions have been considered in depth by this Court in numerous reported decisions, and they do not warrant further discussion here. *See generally State v. Austin*, 618 S.W.2d 788 (Tenn.1981); *State*

v. Pritchett, 621 S.W.2d 127 (Tenn.1981); *Houston v. State*, 593 S.W.2d 267 (Tenn.1980).

The final issue presented by appellant is whether a new sentencing hearing is justified because of insufficiency of the evidence to support one of the aggravating circumstances found by the jury. After careful consideration we are of the opinion that if any error was committed by the jury, it was harmless beyond a reasonable doubt in view of multiple aggravating circumstances which were clearly established.

In the guilt phase of the case the jury found that appellant was guilty of murder in the first degree as a matter of common law and also of felony-murder in the perpetration of burglary. The latter, in itself, is one of the statutory aggravating circumstances warranting the death penalty. T.C.A. § 39-2-203(i)(7). In reporting aggravating circumstances at the end of the sentencing hearing, however, the jury did not repeat this particular circumstance although it is abundantly established by the evidence. The jury did find, however, three other aggravating circumstances which were clearly shown by the evidence. The first of these was that the accused had previously been convicted of one or more felonies involving the use or threat of violence to the person. T.C.A. § 39-2-203(i)(2). As mentioned previously, it was proved that appellant had been convicted of three separate armed robberies in Oklahoma in 1982.

The jury also found that the murders in question were especially heinous, atrocious, or cruel in that they involved torture or depravity of mind as provided in

T.C.A. § 39-2-203(i)(5). The evidence abundantly established that both of the elderly victims had been brutally beaten to death by multiple crushing blows to the skulls. Blood was spattered throughout the house, and both victims apparently had attempted to resist, because numerous defensive wounds were found on their persons. The only excuse offered in the entire record for this unspeakably brutal conduct by the accused was that these elderly victims had at some point ceased to "cooperate" with him in his ransacking of their home and in his effort to flee from arrest. As previously stated, it was stipulated by counsel for appellant that there was no issue of self-defense even remotely suggested. The deaths of the victims were not instantaneous, and obviously one had to be killed before the other. The terror, fright and horror that these elderly helpless citizens must have endured was certainly something that the jury could have taken into account in finding this aggravating circumstance.

The jury also found that the accused committed the murders for the purpose of preventing a lawful arrest or prosecution, an aggravating circumstance specified in T.C.A. § 39-2-203(i)(6). This circumstance was established not only by the testimony of police officers but by appellant's own statement to his expert witnesses.

It thus appears that four aggravating circumstances were indisputably established by the record, and three of these were reported by the jury at the end of the sentencing hearing. The jury also reported another aggravating circumstance, T.C.A. § 39-2-203(i)(3) as follows:

> "The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during his act of murder. . . . "

It is clear from the record that on the afternoon of August 9, 1980, the accused shot two persons and attempted to shoot a third in escaping from an armed robbery after a high-speed automobile chase. On the next morning he terrorized Ms. Teuch and some hours later killed Mr. and Mrs. Todd. There is considerable logic and plausibility to the finding of the jury that the acts of murder were committed during the course of an attempted escape from this crime spree, and certainly more than two persons were in danger.

We are of the opinion, however, that generally the statute does not contemplate an extended criminal episode, but contemplates either multiple murders or threats to several persons at or shortly prior to or shortly after an act of murder upon which the prosecution is based.[2] We are therefore doubtful that the record in the present case sustains the jury verdict as to this aggravating circumstance. Nevertheless, where three others were clearly found by the jury and the record demonstrates a fourth, we are of the opinion that the jury finding with respect to this aggravating circumstance, if erroneous, was harmless

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[2] There could be situations where substantial periods of time might be involved, such as in the taking of hostages or the hijacking of a plane or other vehicle. It is unnecessary here to attempt to define all possible fact situations which might be covered by this statute. It was held applicable in *State v. Workman*, 667 S.W.2d 44 (Tenn.1984) where an escaping robber killed one police officer and fired at two others.

beyond a reasonable doubt and does not warrant the granting of a new sentencing hearing. In this respect, the case differs markedly from *State v. Pritchett*, 621 S.W.2d 127 (Tenn.1981), in which there were only two aggravating circumstances found and the evidence did not support one of these. In the recent case of *State v. Workman*, 667 S.W.2d 44 (Tenn.1984), the Court upheld a death sentence where there was some question as to one of the aggravating circumstances found by the jury. The Court found that the validity of the sentence would not be affected even if the jury had erred as to one circumstance where numerous others were clearly established.

Pursuant to T.C.A. § 39-2-205 we have reviewed the sentence of death in this case and are of the opinion that it is not in any way disproportionate under all of the circumstances, including the brutal murders of two elderly defenseless persons by an escaping armed robber who had terrorized a residential neighborhood for twenty-four hours.

The judgment and sentence are affirmed at the cost of appellant. Unless otherwise ordered by this Court or other proper authority, the sentence will be carried out as provided by law on June 29, 1984.

Justice Brock concurs in affirming the conviction in this case but dissents with respect to the imposition of the death penalty for reasons stated in his dissenting opinion in *State v. Dicks*, 615 S.W.2d 126, 132 (Tenn.1981).

FONES, C.J., and COOPER and DROWOTA, JJ., concur.

BROCK, J., partial dissent.

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE AT JACKSON

SEPTEMBER 1987

GARY BRADFORD CONE, APPELLANT	)	No. 79
	)	Shelby Criminal
	)	Honorable Arthur T. Bennett, Judge
VS:	)	
	)	(Post Conviction Relief)
STATE OF TENNESSEE, APPELLEE	)	(Filed Nov. 4, 1987)

FOR THE APPELLANT:

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FOR THE APPELLEE:

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AFFIRMED

LLOYD TATUM, SPECIAL JUDGE

OPINION RELEASED: NOV 4 1987

OPINION

This is an appeal by Gary Bradford Cone from a judgment denying post conviction relief. The appellant

was convicted of first-degree murder and the death penalty was imposed. He was also found guilty of several other offenses. On direct appeal, the Supreme Court of Tennessee affirmed the conviction. *State v. Cone*, 665 S.W.2d 87 (1984). The opinion of the Supreme Court summarizes the facts and we will not repeat them here except insofar as is necessary to discuss the issues presented.

The first issue presented is:

> " The improper final arguments of both prosecutors for the State at the conclusion of the trial to determine guilt or innocence affected the verdict of the jury to the prejudice of the defendant."

The appellant was convicted of beating an elderly couple to death on August 10, 1980. He was given the death penalty for each of the two murders.

On August 9, 1980, the appellant robbed a jewelry store in Memphis. In a high-speed chase after the jewelry store robbery, the appellant abandoned his automobile. In the automobile there was found a great quantity of assorted drugs. The list of these drugs is composed of four pages in the transcript of the original trial.

Officers also found the sum of $2,459.94 in the appellant's abandoned automobile. At the time of the trial, the appellant was under indictment for the robbery of a Big Star grocery store from which $1,893.72 was taken. The Big Star robbery also occurred on the day before the murder of the two elderly people. The record does not reveal the source of the rest of the money that was found in the abandoned automobile ($566.22).

It might be said that the proof that the appellant killed these two victims is conclusive. At trial, the appellant admitted committing these homicides and the other crimes involved.

The only defense interposed by him was that of insanity, or lack of mental capacity, due to drug abuse (chronic amphetamine psychosis) and to stress arising out of his previous service in the Vietnamese War (Vietnam Veteran Stress Syndrome). Hence, it was his theory that he was a drug addict. It was the prosecution's theory that the appellant was not a drug addict.

The following occurred during the opening argument by the State at the guilt phase of the trial:

> "GENERAL PATTERSON: Has an automobile that – I've got a '73 automobile. How does he do all this? I'm not trying to be absurd, but he says he's a drug addict. *I say balony.* (sic) *He's a drug seller.* Doesn't the proof show that? Well, let's see what we found in this car – (emphasis added)
>
> MR. DICE: I want to object, if Your Honor please, for the record.
>
> GENERAL PATTERSON: Let's see what –
>
> THE COURT: Excuse me.
>
> MR. DICE: Not indicted. Not charged. Not one piece of evidence.
>
> THE COURT: Yes, I'm going to sustain the objection to any argument along the line of drug selling, General. I think that's improper argument.

GENERAL PATTERSON: For a point of clarification, I can argue an inference from the fact, can't I?

THE COURT: Yes, but you can't argue the inference from the fact that someone has been violating the law by selling drugs, I think, General. So, I'm going to have to sustain the objection to that."

After the State's opening argument, defense counsel argued the defense theory that the appellant was insane due to drug abuse. There was also argument by the defense concerning the appellant's indigency. In response, the State argued as follows:

"GENERAL STROTHER: The last time that I heard anything about his client, his client had over $2,000 cash on him. His client had flown to Hawaii. His client was living in Key West. His client had bought a motorcycle. His client had an automobile. That's just lawyer talk, that indigency business.

He say, (sic) well, the State shows no evidence. Where are the indictments? Where are the charges for drug sales? There aren't any charges for drug sales, but that doesn't mean that you can't look and question in deciding whether or not this man was, in fact, a drug user, or why he had those drugs. Did he just have those drugs, or did he have those drugs and thousands of dollars in that car? Among those drugs are there only the drugs he used? How do we know if he used drugs? The only thing that we ever had that he used drugs, period, is the fact that those drugs were in the car and what he told people. What he told people. But according to even what he told people,

there are drugs in there he didn't even use. A whole page of drugs. Barbiturates that he didn't even use. Why would those be there? Why would he have those in there? Why? *Common sense, and a reasonable answer to that? Same place that $2,000 came from.*" (Emphasis added)

The above-quoted argument by the State is the basis of the complaint of prosecutorial misconduct. The appellant says that the prosecuting attorneys knew, or should have known, that most of the money found in the appellant's abandoned vehicle came from a robbery that occurred on August 9, and not from the sale of drugs. At the post-conviction hearing, one of the prosecuting attorneys testified that he was aware of the indictment for the Big Star robbery but had not familiarized himself with the details because the District Attorney's office had no intention of prosecuting that case. The trial court held that the reference to the money was not made with an improper intent.

The test for alleged improper prosecutorial misconduct is, "whether the improper conduct could have affected the verdict to the prejudice by the defendant." *Judge v. State*, 539 S.W.2d 340, 344 (Tenn.Crim.App.1976). The great quantity of assorted drugs found in the appellant's abandoned automobile supplied a strong inference that the drugs were possessed for resale. *State v. Dowell*, 705 S.W.2d 138 (Tenn.Crim.App.1985); *Wells v. State*, 509 S.W.2d 520 (Tenn.Crim.App.1973), *affm'd*. 517 S.W.2d 755. In view of the abundant other evidence that the appellant was a drug salesman, we find that the reference to the money was relatively insignificant, although it should have not been made. There was abundant evidence, not

referred to in the above-quoted argument, that the appellant was not a drug addict. We find beyond a reasonable doubt that the reference to the money did not affect the verdict of the jury in either the guilt or punishment stage of the trial.

In the second issue, the appellant asserts that trial counsel was ineffective. The appellant alleges that his trial attorney rendered ineffective assistance by (1) failing to interview the State's rebuttal witness, Ilene Blankman, prior to trial; (2) in failing to object to the improper argument of General Strother implying that the petitioner was a drug dealer; (3) inadequate cross-examining the State's expert witnesses; (4) failing to introduce mitigating evidence at the sentencing phase of the trial; and, (5) failing to make a final argument at the sentencing phase. We will discuss each of these contentions.

FAILURE TO INTERVIEW WITNESS

It is admitted that counsel failed to interview Ilene Blankman, a rebuttal witness for the State, prior to trial. Briefly, she testified that she was the appellant's girlfriend, that the appellant was not a drug addict and had no needle marks on his body. The trial court found that counsel knew Ms. Blankman was going to testify for the State. Defense counsel discussed this fact with the appellant and the appellant strongly insisted that defense counsel not talk with her. She was a former girlfriend and the appellant informed defense counsel in detail regarding his relationship with her. Defense counsel cross-examined her. There is no showing that her testimony would have been different had defense counsel talked

with her before trial or that the failure to interview in any manner prejudiced the appellant. The trial court found that even if it could be said that counsel's performance was deficient in this regard, such deficiency was not prejudicial and did not render the assistance of counsel ineffective. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984).

FAILURE TO OBJECT TO IMPROPER ARGUMENT

The appellant contends that his attorney failed to object to the above-quoted argument of General Strother at the guilt phase implying that the petitioner was a drug dealer. As above stated, the argument by the State was legitimate in context of this case: there was an issue as to whether the drugs found in the appellant's car were possessed by the appellant for his own use or his inventory as a drug dealer. Also as stated, the argument concerning the amount of money in the car might have been objectionable but was relatively insignificant. The trial attorney testified that he did not object to the argument because he did not want to reemphasize it to the jury. The trial court accredited defense counsel's testimony in this regard. Counsel's strategic decision not to object was a legitimate trial tactic, the exercise of which does not furnish a basis for finding counsel's representation deficient. See *State v. Martin*, 627 S.W.2d 139, 141 (Tenn.Crim.App.1981). Moreover, the reference to the amount of money was relatively insignificant when considered with all of the other evidence above referred to. Hence, the failure to object did not prejudice the appellant. The Trial Court concluded that this tactic did not amount to ineffective assistance of counsel.

INADEQUATE CROSS-EXAMINATION OF EXPERT WITNESSES

The appellant contends that trial counsel failed to adequately cross-examine the State's expert witnesses on the insanity issue. This issue was not raised in the post conviction petition, nor was there any evidence on this issue at the post conviction hearing. An issue raised for the first time on appeal is waived. *Ellison v. State*, 549 S.W.2d 691, 694 (Tenn.Crim.App.1976). Moreover, the record fails to support the petitioner's contention on appeal.

FAILURE TO INTRODUCE MITIGATING EVIDENCE

The appellant contends that counsel's representation was insufficient because he failed to introduce any mitigating evidence at the sentencing phase. The appellant stated that two medical experts who testified for the defense at the guilt phase of the trial should have been reintroduced to testify at the penalty phase as to the appellant's mental state at the time the crimes were committed. He also contends that his mother should have been reintroduced to testify concerning his early childhood.

The trial court accredited the testimony of the defense attorney during which he explained that this evidence had been presented during the guilt stage of the proceeding. Trial counsel was aware that the trial judge would instruct the jury that it should consider mitigating circumstances proved at the guilt stage of the trial. Defense counsel also testified that the appellant's mother

did not make a good witness at the guilt stage of the trial and in his judgment, the best tactic was to not subject her to further cross examination.

The appellant also complains because defense counsel did not introduce other relatives and associates to testify concerning his early childhood. Defense counsel testified that these potential witnesses were interviewed by him and that he concluded that there was a danger that cross examination would elicit additional criminal activity on the part of the appellant. There is nothing in the record to show that the testimony of these witnesses would have benefited the defense. In the absence of this showing, we will not presume that trial counsel erred in not calling them as witnesses. See *State v. Martin, supra.*

The appellant also states that his mother should have been called as a witness to enable her to make "a plea to the jury for her son's life." If the appellant means by this that the mother should have been permitted to make an emotional appeal or speech to the jury, this practice is not permitted in our system.

The appellant also argues that a letter written to the appellant by a member of the family of the victim should have been introduced at the penalty phase. One member of the victim's family, who wrote this letter, apparently forgave him for committing these offenses. We fail to see how a forgiving letter written by someone else would mitigate the appellant's guilt.

The appellant agreed that he would not testify at either stage of the trial. The appellant told his attorney that he could not control his anger toward the prosecuting attorneys. Defense counsel discussed at length on

different occasions the question as to whether the appellant should testify and it was his informed decision not to testify.

FAILURE TO MAKE FINAL ARGUMENT AT THE SENTENCING PHASE

The appellant contends that counsel's performance was deficient because he failed to make a final argument pleading for the petitioner's life at the sentencing phase. The trial judge found that counsel deliberately waived final argument as a tactic.

One of the prosecuting attorneys made a low-key opening argument after the punishment hearing. It was trial counsel's judgment that he should waive argument to prevent the other prosecuting attorney from making closing argument. The other prosecutor was capable of making very devastating closing arguments and he could not be answered by defense counsel. This is a legitimate trial tactic, the exercise of which furnishes no basis for a finding of ineffective assistance. See *State v. Martin, supra.*

The question of what witnesses to use and whether to waive final argument are tactical questions upon which competent lawyers might disagree. It cannot be said that incompetent representation had occurred merely because other lawyers, judging from hindsight, might have made a better or different choice of tactics. *Hellard v. State,* 629 S.W.2d 4, 12 (Tenn.1982); *Martin v. State, supra.*

The trial court found the factual issues in favor of the State and found that trial counsel was not ineffective. The Court's factual findings are binding on this court unless the evidence preponderates against them. *Graves v. State,*

512 S.W.2d 603, 604 (Tenn.Crim.App.1973). The evidence does not preponderate against the trial court's findings.

Trial counsel made a diligent and thorough investigation of the facts and the law. Although the appellant was without funds, trial counsel was able to procure a defense team composed of himself, a research expert, medical experts, and an investigator. No stone was left unturned in the preparation of the appellant's defense. Trial counsel was very conscientious in representing the appellant and placed much thought and effort into the tactical aspects of this case. However, trial counsel's work and diligence could not remove the overwhelming evidence against the appellant, both on the factual issue and insanity issue. In our view, the findings of guilt and the imposition of the death penalty were based upon the facts and the law – not by shortcomings of counsel.

We agree with the trial judge that trial counsel met the standard required by *Baxter v. Rose,* 523 S.W.2d 930 (Tenn.1975).

The judgment of the trial court is affirmed.

/s/ Lloyd Tatum
LLOYD TATUM, SPECIAL JUDGE

CONCUR:

/s/ Robert K. Dwyer
ROBERT K. DWYER, JUDGE

/s/ Jerry Scott
JERRY SCOTT, JUDGE

99-5279

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY BRADFORD CONE, Petitioner-Appellant, v. RICKY BELL, WARDEN, RIVERBEND MAXIMUM SECURITY INSTITUTION, Respondent-Appellee.	)	ORDER (Filed Jun. 01, 2001)

BEFORE: MERRITT, RYAN, and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk *In*

IN THE CRIMINAL COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE

STATE OF TENNESSEE, Appellee, v. GARY BRADFORD CONE, also known as "Gerald Mason Harmon", Appellant.	)	Cases Nos. 74902 74898 74899 74900 74702 74703 38171

(Filed Jan. 28, 1983)

TRANSCRIPT OF THE EVIDENCE

VOLUME 20 OF 22 VOLUMES

BEFORE: THE HONORABLE JAMES C. BEASLEY, PRESIDING JUDGE

APPEARANCES

FOR THE APPELLEE:

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Mr. Joseph L. Patterson
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FOR THE APPELLANT:

Mr. John Dice
Mrs. April Ferguson
Attorneys at Law
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* * *

[2115] MR. DICE: May it please the Court, and ladies and gentlemen of the jury: We talked about on the opening statement before about what the procedure in this courtroom would be if we got to this stage in the trial. I think all of us are fairly well familiar with that.

So, just as a brief refresher on that, as General Strother says, in this stage – the State is entitled to opening and the Defense is. Proof can be put on by either side as to aggravating and mitigating circumstances, and then after that is done the State has the right of making a closing argument, and so does the Defense.

What we're going to do in this particular phase of the case, as I've said to you all in the beginning of this trial, is that we will deal in death, or, we will deal in life. That is exactly where we are, and certain circumstances are going to be pointed out to you.

I agree with the General that the proof – I believe His Honor will tell you that was presented in the main portion of this case can be considered by you in considering both aggravating and mitigating circumstances. I'd [sic] also would make these comments in regards to that.

The Defense read to you what mitigating circumstances were present. The Defense has put on proof of those mitigating circumstances during its case, and I would like to review those with you.

[2116] We say that the mitigating circumstances which will apply in this particular case are as follows:

We say that the murder involved in this particular case was committed while the Defendant was under the influence of extreme mental or emotional disturbance.

We say that because Dr. Jaremko testified that in his opinion – and I realize there's been conflicting testimony – that he was suffering from a psychosis that continues until present. In his case, Vietnam Veteran's Stress Syndrome. From the standpoint of Dr. Lipman, of what he called Amphetamine Psychosis. Dr. Bursten, of course, had his opinion. Dr. Hutson had his opinion.

We also say that the mitigating circumstance of the Defendant acting under the extreme duress in this particular case can be considered by you, as follows.

That the Court will charge to you that one of the mitigating circumstances which can be considered by you in a case of this nature is whether:

> " – The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment. –

[2117] And in going back at that, there's been a lot of issues brought up before all of you in terms of whether or not my client is the junkie and drug addict that we say he is.

And the General said that he'll prove that my client was incarcerated for three robberies in Oklahoma, and I guess he'll present some further proof on that. I don't know. But if you remember, in considering this mitigating

circumstance and remembering the proof, when he was arrested in Pompano Beach, according to Agent Flynn, he was arrested robbing a drug store, seeking drugs, and according to Officer Roby, looking for syringes. And I suggest that you consider whether or not that action is the action of an addict looking for his source of supply.

And I again ask you to consider that particular mitigating circumstance in looking at this – weighing and balancing of the mitigating circumstances.

I suggest to you that Dr. Jaremko stated, in his interview with my client, my client has expressed remorse for his conduct. That is not a statutory mitigating circumstance, but it is a circumstance that you can consider, as the General says, under the rule.

And I asked all of you, each and every one of you, to look at the whole man in this case, when we began. And I suggest to you that proof has been put in this record [2118] that he is an honorably discharged veteran of his country, and I ask you to look at that in light that there is no evidence of any kind, of any nature, in this record, other than the fact that his drug abuse began under the stress and strain of combat service. And I suggest to you that that is a mitigating circumstance.

Yesterday, during the heat of battle, General Strother referred to my client as an animal. Now, we're in the position here on opening statement of talking about the alternatives that are available. I suggest to all of you that we are not animals in this jury box, and I suggest to you that animals do not kill if there is an alternative. And there is good reason for maintaining life if you look at the whole man in this particular case.

The position that we're in, perhaps again, our ethics have been questioned, the Defense team. If we're unethical to seek mercy, then I am unethical. But mercy is – it's a double blessing. It's a blessing to the person who gives, and it's a blessing to the person who receives. And I would say to you that mercy – if you consider life under the mitigating circumstances, and the aggravating circumstances in this case – raises you above the State, raised you above the King, if you will. It raises you to the level of God.

And I ask you to consider all of those facts as [2119] you decide whether or not you will kill Gary Cone. Now, under the proof, perhaps, the theory of the State will be that Gary Cone has put himself in this position. But I submit to you there are victims in this case called the Todds, a fine elderly couple. there is also a victim in this case, of society, named Gary Cone. Thank you.

THE COURT: You may call the first witness.

MR. PATTERSON: James A. Blackwell, please.

STATE'S PROOF

J. A. BLACKWELL, called as a witness by the State, and after first having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PATTERSON:

Q. State your name for the Court and jury, and spell your last name for the record, please.

* * *

DEC 7 PAGE 12

(9)

Supreme Court, U.S.
FILED
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CLERK

01-400

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

RICKY BELL, Warden

Petitioner

v.

GARY BRADFORD CONE,

Respondent

MOTION TO PROCEED IN FORMA PAUPERIS

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Counsel for Sedley Alley
* Counsel of Record

Comes now your petitioner, Gary Braford Cone, and moves this Honorable Court pursuant to Rule 39 of the United States Supreme Court Rules to proceed in forma pauperis. In support of this motion, your petitioner would show the Court that:

1. Gary Cone was declared indifent by the district court, and allowed to proceed in forma pauperis pursuant 28 U.S.C. §1915. Robert Hutton and Paul Bottei were appointed as counsel for Mr. Cone purusant to 21 U.S.C. §848(q). Additionally, Gary Cone was allowed to proceed in forma pauperis on appeal, and Robert Hutton and Paul Bottei were reappointed to represent him before the Sixth Circuit.

2. Since Mr. Cone was allowed to proceed in forma pauperis in both the district court, and the United States Court of Appeals for the Sixth Circuit, Rule 39 allows Mr. Cone to proceed before this Honorable Court in forma pauperis.

WHEREFORE PREMISES CONSIDERED, Gary Cone prays this motion to proceed in forma pauperis be granted.

Respectfully Submitted,

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Robert L. Hutton

No. 01-400

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

RICKY BELL,

Petitioner

v.

GARY BRADFORD CONE,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court should grant certiorari where the Petitioner has misstated the facts in his questions presented, incorrectly asserting that the lower court applied an improper standard of review?

2. Should this Court grant certiorari where the lower court properly stated and applied the legal standards governing Gary Cone's claim of ineffective assistance of counsel at sentencing; where the facts of the case are unique, undisputed, and never likely to recur; and where the court of appeals correctly reached the unexceptional conclusion that Gary Cone was denied the effective assistance of counsel and is entitled to habeas relief because counsel presented no mitigating evidence at sentencing and made no closing argument in support of a life sentence?

3. Should this Court should grant certiorari to review the judgment below, where the judgment must be affirmed on numerous alternative grounds including: the withholding of exculpatory evidence; the presentation of false testimony; unconstitutional instructions on the meaning of reasonable doubt and malice; unconstitutional application of aggravating circumstances; ineffective assistance of counsel; improper jury instructions requiring unanimity in the finding of mitigating circumstances; systemic exclusion of women from the grand jury; and denial of the right to counsel during trial?

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STATEMENT OF FACTS AND STATEMENT OF THE CASE

A.
FEDERAL HABEAS PROCEEDINGS

In the United States District Court, Gary Cone filed a petition for writ of habeas corpus raising various claims of constitutional error, including challenges of ineffective assistance of counsel, the withholding of exculpatory evidence, the presentation of false testimony, unconstitutional aggravating circumstances, and unconstitutional jury instructions.

1.
INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING

In federal habeas proceedings, Gary Cone asserted he was denied the effective assistance of counsel because counsel failed to present mitigating evidence at sentencing and, following the prosecution's argument seeking imposition of the death sentence, counsel remained silent. See Petition For Writ Of Habeas Corpus, ¶40. The District Court, however, denied relief on this claim.

2.
WITHHOLDING OF EXCULPATORY EVIDENCE

Gary Cone also alleged that the prosecution withheld material exculpatory evidence at trial. Specifically, where the defense was insanity, where the prosecution claimed that Gary Cone never used drugs, and where the entire dispute at trial was about Gary Cone's mental state, Gary Cone asserted that the prosecution withheld extensive evidence establishing that he suffered a long history of drug use and confirming his defense that he was insane.

Specifically, Gary Cone asserted that the prosecution had withheld numerous District Attorney documents, as well as F.B.I. documents (obtained for the first time through discovery in federal court) which detailed Gary Cone's history of heavy drug use at and around the time of the offense (Petition For Writ Of Habeas Corpus, ¶39). Those documents included evidence which demonstrated that Mr. Cone was indeed addicted to drugs and suffering from mental illness, and evidence which would have impeached assertions to the contrary made by both the prosecution in its argument and by rebuttal witnesses Sergeant Roby, Ilene Blankman, and Agent Flynn.

Evidence withheld by the prosecution and never heard by the jury falls into four separate categories.

First, the prosecution withheld statements showing that Gary Cone was indeed heavily using drugs and on drugs at and around the time of the offense, including statements of: (1) Robert McKinney, who stated that two days before the killings, Gary Cone "acted real weird" and appeared to be on drugs;[1] (2) Charles and Debbie

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[1] District Attorney's File, Documents 1081-1084. (R. 71 Petition For Writ Of Habeas Corpus, ¶39a.v.; R. 165 Motion To Expand The Record, Ex. 2).

Slaughter, who said that Gary Cone "looked wild eyed" the day before the killings;[2] (3) Sergeant Grieco of the Pompano Beach, Florida, Police Department who described Gary Cone as "frenzied" and "agitated" just days after the killings;[3] and Chief Daniels of the Lake Village, Arkansas Police Department, who informed authorities that Gary Cone "was a heavy drug user."[4]

Second, the prosecution withheld evidence which would have impeached Officer Roby and shown the falsity of Roby's assertions to the jury that there was no evidence Gary Cone used drugs, including: evidence that Roby knew that Gary Cone was a heavy drug user, having personally sent A.P.B.s throughout the nation warning that Gary Cone was not only a "drug user,"[5] but a "heavy drug user;"[6] and proof that Roby had been told by Gary Cone's sister that he "has a severe psychological problem" and

[2] District Attorney's File, Documents 90, 167-169. (R. 71 Petition For Writ Of Habeas Corpus, ¶39a.iv; R. 165 Motion To Expand The Record, Ex. 2).

[3] District Attorney's File, Document 623. (R. 71 Petition For Writ Of Habeas Corpus, ¶39a.vii).

[4] R. 71 Petition For Writ Of Habeas Corpus, ¶39a.viii.

[5] District Attorney's File, Document 850 (August 11, 1980 law enforcement teletype memo authorized by Sergeant Roby stating that Gary Cone is a "drug user"); Document 779 (August 11, 1980 teletype document indicating Gary Cone's drug usage) (R. 71 Petition For Writ Of Habeas Corpus, ¶¶39a.ii & 39a.iii & Exs. 6 & 7).

[6] District Attorney's File, Document 852 (Teletype from Sergeant Roby which states that "suspect is a heavy drug user") (R. 71 Petition For Writ Of Habeas Corpus, ¶39a.i & Ex. 5).

"needed to work on his drug problem."[7]

Third, the prosecution withheld evidence showing that the F.B.I. likewise knew that Gary Cone had a severe drug problem, evidence which would have impeached Agent Flynn and would have shown that jury the misleading nature of Flynn's testimony indicating that Gary Cone was not insane. That evidence included: (1) numerous nationwide F.B.I. alerts stating that Gary Cone was indeed a heavy drug user;[8] (2) an FBI document showing Gary Cone's possession of large amounts of amphetamines in the late 1970s;[9] and (3) proof that, prior to testifying, Agent Flynn had access to Dr. Jonathan Lipman's report in the F.B.I. file, which demonstrates that Flynn was not a disinterested, truthful witness, but a biased witness who was collaborating with the prosecution and coached about how to rebut the defense case.[10]

Fourth, the prosecution withheld evidence showing that Ilene Blankman was likewise untruthful and not disinterested when she claimed at trial that Gary never used

[7] District Attorney's File, Document 507 (Statement of Sue Cone to Officer Roby)(R. 71 Petition For Writ Of Habeas Corpus, ¶39a.vi).

[8] FBI File, Documents 129-130; 140; 142; 143-144; 159; 164; 174-183; 239-240; 257-262, 265-267, 343-344 (teletypes describing Gary Cone as "drug user" and "heavy drug user") (R.71 Petition For Writ Of Habeas Corpus, ¶¶39e & Exs. 8, 9, 10, 11, 12, 13, 14, 15, 17).

[9] FBI File, Documents 171-173 (Teletype from Oklahoma City to Chicago, Little Rock and Memphis, dated August 13, 1980, stating that "While in prison, Cone was caught in possession of 850 amphetamine pills which had been supplied to him...") (R. 71 Petition For Writ Of Habeas Corpus, ¶39e.ix & Ex. 16).

[10] F.B.I. File, Documents 7-26 (R. 71 Petition For Writ Of Habeas Corpus, ¶39i.iv).

drugs. Specifically, the prosecution withheld evidence showing: (1) Blankman's pre-trial statement to prosecutors was inconsistent with her testimony at trial, because she never stated that Gary Cone showed no indication of using drugs;[11] (2) Blankman had a cozy relationship with the prosecutors and was biased against Gary Cone, as evidenced by the prosecutors' ongoing contact with her, their providing for her review her pretrial statements on more than one occasion (showing that she was being coached),[12] the prosecutors' dining with her during the trial itself;[13] and the prosecution's special "thank you" to her after the trial, when no other lay witness received any such treatment;[14] and (3) evidence that she did not deny testifying falsely at trial.[15]

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[11] District Attorney File, Documents 1750, 1752 (Handwritten notes of prosecution interview with Blankman in which she never stated damaging information against Gary Cone) (R. 71 Petition For Writ Of Habeas Corpus, ¶39i.v).

[12] District Attorney File, Documents 783 (February 9, 1982 letter from prosecutor Joseph Patterson to Ilene Blankman, which confirms that he had contacted her earlier, and in which he provided her statement); 789 (A second letter, dated March 22, 1982, from prosecutor Joseph Patterson to Ilene Blankman, confirming a telephone conversation with Ms. Blankman concerning her court appearance, and once again providing her a copy of her statement to the police) (R. 71 Petition For Writ Of Habeas Corpus at ¶39i.i & i.ii).

[13] F.B.I. File, Document 4-5 (Blankman ate dinner with the prosecutors during trial) (R. 71 Petition For Writ Of Habeas Corpus, ¶39i.iii).

[14] District Attorney File, Document 691 (April 27, 1982 letter from prosecutors Joseph Patterson and Don Strother thanking Blankman for her assistance) (R. 71 Petition For Writ Of Habeas Corpus, ¶39i.vi).

[15] F.B.I. File, Document 4-5 (when confronted with allegations that she had testified falsely at trial, Blankman refused to respond) (R. 71 Petition For Writ Of Habeas Corpus, ¶39i.iii).

The District Court denied claims arising from the withheld District Attorney and F.B.I. documents.

3.
PRESENTATION OF FALSE INFORMATION TO THE JURY

With the critical dispute at trial being Gary Cone's sanity, the prosecution convinced the jury to convict and impose the death sentence by falsely arguing that money found in Gary Cone's car showed drug dealing, and not drug usage. Specifically, the prosecution argued against the insanity defense by claiming that cash found in the car demonstrated that Gary Cone sold drugs, not that he used drugs: "I'm not trying to be absurd, but he says he's a drug addict. I say Baloney. He's a drug seller. Doesn't the proof show that? Well, let's see what we found in this car . . ."(Final Argument at TR 2015). The trial court sustained an objection to this line of argument, Id., but then the prosecution continued in the same vein, arguing that the money in the car showed not drug usage, but drug selling: "What was in that car? You have the benefit of what was in that car. Sure, he had a drug store in that car. What else did he have? I believe Sergeant Roby said that he had $2,400 and some odd cents in American currency. Did he get it from working? I submit to you that he did not. . . ." (Final Argument at TR 2016). The prosecution later continued with its assertion that the money found in the car was proceeds from drug sales, and not proof of drug addiction or insanity: "The only thing that we ever had that he used drugs, period, is

the fact that those drugs were in the car and what he told people. . . . ."(Rebuttal Argument at TR 2068).

In the United States District Court, Gary Cone alleged that the prosecution's arguments were false and known to be false, because the prosecution knew that the money in the automobile had actually come from an unrelated robbery of a Big Star supermarket. Indeed, during post-conviction proceedings, it was shown that $1,893.72 was taken from the Big Star. (Post Conviction I, Don Strother at TR 19). The money recovered from the car was $2,459.94. (Post Conviction I, Don Strother at TR 20). Yet it was also established that only $5,66.22 was ever transferred from the Police Department to the Shelby County Criminal Court Clerk's Office to be used as evidence against Mr. Cone. (Post Conviction I, Don Strother at TR 23). This means that exactly $1893.72 was not used as evidence -- the exact amount which was taken from the Big Star.

In fact, notes in Assistant District Attorney Strother's own handwriting confirm that he knew that $1,893.72 was taken from the Big Star. His handwritten notes prepared for indicting Gary Cone on that robbery state: "Stephenson's Big Star — $1,893.72." (R. 98 Memorandum In Support Of Petitioner's Motion For Evidentiary Hearing, Exhibit A). Further, the District Attorney File contains a letter from the Insurance Company of America demonstrating that they paid Big Star $2,013.72 as a

result of that robbery (Id., Exhibit B).[16] The District Court denied discovery and a hearing, and denied relief on the claim.

4.
ADDITIONAL CLAIMS OF CONSTITUTIONAL ERROR PRESENTED IN THE HABEAS PETITION

In habeas proceedings, Gary Cone also raised numerous other challenges to his conviction and death sentence, including: (1) Ineffective assistance of counsel at the guilt and sentencing phases of trial (Petition For Writ of Habeas Corpus, ¶¶ 40 *et seq*); (2) Unconstitutional instructions on the meaning of "reasonable doubt," Petition For Writ Of Habeas Corpus, ¶38; (3) The jury made an unconstitutional finding of the "great risk of death" aggravating circumstance (Tr. 2220); (4) The jury weighed an unconstitutionally vague "heinousness" aggravating circumstance (Tr. 2220); (5) The jury was given unconstitutional instructions on the element of malice (Petition For Writ Of Habeas Corpus, ¶37); (6) Sentencing instructions requiring unanimity precluded the full consideration of mitigating evidence (¶43, 47g); (7) Women were unconstitutionally excluded as grand jury forepersons for over a century (¶62); (8)

[16] Gary Cone requested discovery and an evidentiary hearing on this claim of prosecutorial misconduct (R. 95 Motion For Discovery; R. 96 Memorandum In Support; see also R. 97 Motion for Evidentiary Hearing, and R. 98 Memorandum in Support). He noted that he had not received a full and fair hearing on the claim in the state courts, because Don Strother had testified falsely at the post-conviction hearing. Specifically, Strother testified that there was nothing in the District Attorney "file which indicates anything whatsoever about the money that was taken from Big Star." (Post Conviction I, Don Strother at TR 20). The subsequent disclosure of the District Attorney's file reveals that this statement was false, given Strother's own handwritten notes concerning the amount of money taken from the Big Star, and the insurance letter concerning the money taken from the Big Star.

Gary Cone was denied the right to counsel during trial because he was precluded from sitting with counsel (¶65). The District Court denied relief on all these claims as well.

B.
THE COURT OF APPEALS GRANTS HABEAS RELIEF

On appeal, the Sixth Circuit reversed the judgment of the district court and granted relief on Gary Cone's claim that he was denied the effective assistance of counsel at sentencing because counsel failed to investigate and present mitigating evidence, and failed to make a closing argument asking that the jury spare his life. As more fully discussed *infra*, the court of appeals addressed the claim at length, concluding that counsel's failure to present mitigating evidence and make a closing argument for life deprived Gary Cone of the effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), and that he was therefore entitled to habeas corpus relief under 28 U.S.C. §2254(d). See Cone v. Bell, 243 F.3d at 975-979.

Given the court's grant of relief as to sentence, the court of appeals pretermitted consideration of various claims of constitutional error relating to the imposition of the death sentence. Cone v. Bell, 243 F.3d at 975. The court of appeals denied relief on all other claims. Cone v. Bell, 243 F.3d at 968-975.

C.
POST-JUDGMENT PROCEEDINGS IN THE SIXTH CIRCUIT

Following the court of appeals' ruling, the Warden filed a petition for rehearing and suggestion for rehearing *en banc*. In support of his suggestion, the Warden asserted that "the panel decision erroneously applied a *de novo* standard of review with respect to Cone's ineffective assistance of counsel claim contrary to 28 U.S.C. §2254(d) . . . ." Warden's Certification Of Grounds For Rehearing: Petition For Rehearing *En Banc*, pp. ii-iii. In response to the Warden's petition, Gary Cone respectfully noted that Warden had misstated the record in making such an assertion. Responding to the Warden's petition, Gary Cone succinctly stated:

> The essence of [the Warden's] complaint, however, is that the panel supposedly misapplied Williams v. Taylor, 529 U.S. 362 (2000) by engaging in *de novo* review of Gary Cone's *Strickland* claims. The very nature of Appellee's complaint – which itself is wholly unfounded (*See infra*) – does not warrant any exceptional review.
>
> Even so, [the Warden's] rehearing petition is based upon the patently incorrect assertion that the panel "applied a *de novo* standard of review with respect to Cone's ineffective assistance of counsel claim contrary to 28 U.S.C. §2254(d) and *Williams v. Taylor*," 529 U.S. 362 (2000)." Rehearing Petition, p. iii. This assertion is simply not true.
>
> In fact, the panel was *explicit* in stating that it was not engaging in *de novo* review. The panel made clear that its review of Gary Cone's ineffective assistance of counsel claims was constrained by 28 U.S.C. §2254(d):
>
> > [T]he state of Tennessee has held that Cone's lawyer's behavior was not ineffective under *Strickland* and we may

> not disturb that ruling unless we are convinced that it constitutes a 'decision that is contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.' 28 U.S.C. §2254(d)(1).

Cone, slip op. at 30. This vital portion of the panel's opinion – which demonstrates the invalidity of Appellee's claim – is conspicuously absent in the rehearing petition itself.

Appellee has thus clearly misapprehended the panel's ruling when he claims that the panel acted erroneously in not applying 28 U.S.C. §2254(d). In a careful analysis, Judges Ryan, Merritt, and Norris certainly did apply that provision. The opinion speaks for itself and refutes Appellee's misleading assertion to the contrary.

Gary Bradford Cone's Response To Petition For Rehearing *En Banc*, pp. 1-2.

The Sixth Circuit *en banc* agreed that rehearing was unwarranted. No judge of the *en banc* court found the Warden's petition worthy of a vote. The petition was denied. See Cone v. Bell, 2001 U.S.App.Lexis 11606 (6th Cir. June 1, 2001)(noting "no judge of this court having requested a vote on the suggestion for rehearing en banc . . .")

THE PETITION SHOULD BE DENIED

I.
PETITIONER MISSTATES THE RULING BELOW IN THE QUESTION PRESENTED

In the petition, the Petitioner claims that certiorari should be granted because the court of appeals "appl[ied] a *de novo* standard of review to a habeas petitioner's

ineffective assistance of counsel claim . . . ." Petition, p. i, Question Presented I. Like Petitioner's misleading assertions to the *en banc* Sixth Circuit, this is yet again a clear misstatement of the ruling of the court of appeals.

The court of appeals not *once* but *twice* stated the standard of review which it applied to the facts. First, before analyzing the ineffective assistance of counsel claim, the court of appeals stated in no uncertain terms the proper standard of review:

> A federal court will not grant *habeas corpus* relief unless the state adjudication of the federal claim 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.' 28 U.S.C. §2254(d)(1)((West Supp. 2000)

Cone v. Bell, 243 F.3d at 967-968. The court of appeals never so much as intimated that it was applying a *de novo* standard of review. Contrary to Petitioner's assertions, the court of appeals made eminently clear that it was applying 28 U.S.C. §2254(d)(1) to review the state court's treatment of Gary Cone's claims.

Then when ultimately granting relief, the court of appeals *again* stated that it was applying the standard of review contained in 28 U.S.C. §2254(d)(1). The court of appeals once again was explicit in its reasoning that relief was required under 28 U.S.C. §2254(d)(1):

> [T]he state of Tennessee has held that Cone's lawyer's behavior was not ineffective under *Strickland* and we may not disturb that ruling unless we are convinced that it constitutes a 'decision that is contrary to, or involved an unreasonable application of, clearly established Federal law, as

> determined by the Supreme Court of the United States.' 28 U.S.C. §2254(d)(1). We conclude that Cone's counsel's refusal to offer any evidence in mitigation and refusal even to address the jurors to ask them to spare Cone's life because counsel feared the prosecutor might make a 'devastating' argument denied Cone his Sixth Amendment right to counsel at sentencing and that the Tennessee court's conclusion to the contrary is an unreasonable application of the clearly established law announced by the Supreme Court in *Strickland*.

Cone, 243 F.3d at 979.

In sum, in seeking certiorari (as he did in seeking *en banc* review), Petitioner has misstated and mischaracterized the record. Not only did the court of appeals *not* apply an improper standard of review, it made clear more than once that was applying the standard of review which Petitioner tries to claim was not applied. Given this clear mischaracterization of the record, Petitioner is thus asking this Court to review an issue which is not even presented by the judgment below. Given these circumstances, the petition must be denied.[17]

II.
PETITIONER MERELY REQUESTS REVIEW OF SETTLED LEGAL PRINCIPLES TO UNIQUE, NON-RECURRING FACTS

The court of appeals merely applied settled legal principles to the unique facts

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[17] References to *de novo* review in the opinion refer to the standard which the Sixth Circuit uses to review holdings of the district court: "We review de novo the district court's disposition of a petition for habeas corpus." Cone, 243 F.3d at 966-967. The panel was not applyi g a de novo standard of review to the state court's findings.

below. Not only did the court of appeals carefully articulate and apply the standard of review contained in 28 U.S.C. §2254(d)(1), (Cone, 243 F.3d at 967-968, 979) the court of appeals also carefully and properly stated the standard governing the ineffectiveness claim.

Quoting directly from this Court's opinion in *Strickland v. Washington*, 466 U.S. 668 (1984), the court of appeals stated:

> To repeat, in order to succeed on an ineffective assistance of counsel claim, a petitioner must show:
>
> > First, . . . that counsels' performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversarial process that renders the result unreliable.

Strickland, 466 U.S. at 687,104 S.Ct. 2052.

Under the first prong of *Strickland*, we must determine whether Cone's counsel, in remaining completely silent during the sentencing phase of the trial, except to declare that he 'rested' – offering no evidence in mitigation and declining to address the court and jury – acted within an objective standard of reasonableness. *Olden v. United States*, 224 F.3d 561, 565 (6th Cir. 2000). If he did not, we must then turn to the second prong of *Strickland* and determine whether the petitioner has demonstrated a reasonable probability that he would not have been sentenced to death but for his counsel's failure. *Strickland*, 466 U.S. at 693-94, 104 S.Ct. 2052.

Cone, 243 F.3d at 976-977.[18] After having stated these unquestionable principles from *Strickland*, the court proceeded to apply *Strickland* (Cone, 243 F.3d at 977-978) after which the court of appeals concluded, as noted *supra*, that in light of *Strickland* and 28 U.S.C. §2254(d)(1), Gary Cone is entitled to habeas corpus relief. Cone, 243 F.3d at 979.

Petitioner, therefore, makes the unexceptional request that this Court grant certiorari to review properly-stated, settled legal principles to the unique facts of this case. Under such circumstances, certiorari is simply not warranted. See U.S.S.Ct.R. 10 (certiorari not warranted where lower court applied facts to properly stated rule of law); Kyles v. Whitley, 514 U.S. 419, 456 (1995)(Scalia, J., dissenting).

Moreover, there is little question that the bare application of settled principles to the facts in this case is even *less worthy* of certiorari than in non-certworthy cases involving application of law to the facts, because the factual circumstances of this case are unique. This is a unique case which involves not only failure to present any mitigating evidence *but also* an abject failure to make a closing argument on Gary Cone's behalf. Compare Overton v. Ohio, 534 U.S.___, 2001 U.S. Lexis 9937 (2001)

---

[18] The Sixth Circuit opinion also refers to U.S. v. Cronic, 466 U.S. 648 (1984), which was decided the same day as Strickland. Cronic discusses instances in which prejudice may be presumed by a court in determining whether counsel was ineffective, as when there has been an actual or constructive total abdication of advocacy. Cronic does not set forth a different test, but merely restates the test set forth in Strickland. Strickland itself notes that prejudice is presumed where there has been the denial of the assistance of counsel. Strickland, 466 U.S. at 692.

(Breyer, J., dissenting from denial of summary reversal)(Supreme Court is not error correction court and even where summary reversal is improperly withheld, certiorari still not appropriate where legal principles have been settled and issue apparently will not recur in future).

III.
THE PETITION PRESENTS AT MOST A REQUEST TO RESOLVE AN INTRACIRCUIT CONFLICT, AND THERE IS NO CONFLICT AMONG THE CIRCUITS

In requesting review, Petitioner also claims that there is conflict in the lower courts, implicilty asserting that the Sixth Circuit's application of the law to the facts here is in conflict with, *inter alia*, Martin v. Rose, 744 F.2d 1245 (6th Cir. 1984) and Green v. Arn, 809 F.2d 1257 (6th Cir. 1987), *vacated on other grounds*, 484 U.S. 806 (1987), and claiming the panel opinion is in conflict with the decisions of other circuits. See Petition, p. 20 *et seq*. Petitioner's assertions are illusory.

A.
PETITIONER IS REQUESTING THAT THIS COURT RESOLVE AN INTRACIRCUIT DISPUTE WHICH WAS NEVER RAISED IN THE COURT OF APPEALS

First, contrary to Petitioner's assertions, there simply is no conflict between the Court of Appeals' judgment and its prior judgments in Martin and Green. In Martin and Green and Cone, the Sixth Circuit properly recognized that certain actions of counsel require a finding that there has been a violation of the Sixth Amendment:

(1) When counsel is mute during the trial (Martin); (2) When counsel is not present in the courtroom (Green); and (3) when counsel presented no evidence and stood mute at closing argument following the prosecution's request for death (Cone). The Court of Appeals' judgment is fully consistent with its prior holdings in Martin and Green.

Nevertheless, with Petitioner disputing the correctness of the Court of Appeals' judgment in light of Martin and Green, certiorari should be denied, because this case thus presents nothing more than a request for this Court referee an internal Sixth Circuit dispute about the application of Martin and Green to the facts here -- a dispute which the Petitioner never even took to the Sixth Circuit *en banc*. This Court's certiorari jurisdiction is not properly invoked to resolve an intracircuit conflict, See Davis v. United States, 417 U.S. 333, 340 (1974), much a less an intracircuit conflict on which the Petitioner never sought *en banc* review.

B.
THERE IS NO INTERCIRCUIT CONFLICT

Perhaps the reason Petitioner never sought *en banc* review on the basis of any purported conflict is that in reality, there is no conflict within the Sixth Circuit, just as there is no conflict among the circuits. In claiming that there is some purported lack of clarity and conflict in the lower courts concerning when prejudice is established in ineffectiveness cases, Petitioner merely recites fact-specific cases from various courts in which prejudice was found. All of the cases cited by Petitioner, however, recognize

the unexceptional principle that lack of advocacy by counsel – whatever the cause – establishes the type of prejudice which the Sixth Amendment cannot (and does not) countenance.

The cases cited by Petitioner are simply cases in which the courts have merely applied Sixth Amendment principles to different facts. The "conflict" proposed by petitioner is thus fictional. Rather, such cases have been decided differently because the particular facts of each case are different – some warranting relief and others not. The differences among such cases are not traceable to legal differences, but to the unique facts of the various cases.

There is thus no conflict in the circuits, a truth which even Petitioner's question confirms. The very fact that Petitioner's question 2 is lengthy and focuses on the unique facts of this case again confirms that Petitioner's request for review is based on a claimed misapplication of law to the facts, not on any conflict in legal principles. Certiorari is therefore not warranted. U.S.S.Ct.R. 10.

IV.
THE JUDGMENT BELOW IS CORRECT

Fundamentally, the court of appeals' recognition that Gary Cone is entitled to relief is correct, and the court of appeals' conclusion is unexceptional. Applying the law of *Strickland* to the unique facts at hand, the court of appeals undertook a lengthy analysis in which it made numerous correct and unexceptional statements:

(1) "[G]iven the uniqueness of the death sentence, the absence of any mitigating evidence, combined with a waiver of oral argument plainly raises a 'red flag.'" Cone, 243 F.3d at 977;

(2) "[W]here the waiver [of closing argument] is not based on a sentencing strategy, or is based upon a decision called 'strategy' which no reasonable observer could credit as involving any logically defendable analysis, the attorney may have performed in a deficient manner." Id.;

(3) "An attorney's decision to present no evidence whatever in mitigation and, *in addition*, to offer no argument when his client faces the prospect of being sentenced to death may amount to a virtual abandonment of the adversarial process that results in injustice, thus demonstrating both deficient performance and prejudice." Id., 243 F.3d at 977-978 (emphasis in original);

(4) "Where mitigating evidence was available, but not adequately investigated and not presented at sentencing, this 'does not reflect a strategic decision, but rather an abdication of advocacy.'" Id. at 978;

(5) "A trial lawyer accused of constitutional ineffectiveness for failing to act where action is ordinarily indicated will almost always have a reason for declining to act. The reason will usually be called the lawyer's 'strategy.' But the noun 'strategy' is not an accused lawyer's talisman that necessarily defeats a charge of constitutional ineffectiveness. The strategy, which means 'a plan, method, or series of maneuvers or strategems for obtaining a specific goal or result,' Random House Dictionary 1298 (Rev. ed. 1975), must be reasonable. It need not be particularly intelligent or even one most lawyers would adopt, but it must be within the range of logical choices an ordinarily competent attorney handling a death penalty case would assess as reasonable to achieve a 'specific goal.'" Id.

After stating these undisputed principles, the panel then undertook an extensive application of the law to the unique facts here. The panel's analysis is cogent. First, the

panel acknowledged that there was no legitimate justification for failing to argue for Gary Cone's life after the prosecution resoundingly demanded his death:

> *Here, the goal, the only conceivable goal, was to persuade the jurors not to sentence Cone to death. How counsel's refusal even to ask the jurors to do that could be called a reasonable strategy to achieve the goal, eludes us.*

> Even if we add up all of counsel's claimed strategic tactics, only one of which was apparently credited by the Tennessee appellate courts and the district court below – avoiding a 'devastating argument by the prosecutor – we think a reasonable attorney would have realized the absolute necessity of arguing for his client's life by making a closing argument. In addition, counsel had plenty of mitigating evidence at his fingertips; yet he failed to present it at the sentencing phase.
>
> *We reject out of hand, the argument that a competent attorney would determine that not presenting mitigating evidence of any kind and not making a final argument in a death penalty case is a justifiable 'strategy' because doing so might trigger a 'devastating' response by the prosecutor – the sole reason assigned by the Tennessee courts for excusing counsel's silence. How much worse off could Cone have been if he were sentenced to death after a 'devastating' argument by the prosecutor than if he were sentenced to death after the prosecutor's 'mild' request that he be sentenced to death, which was followed by his own attorney's silence? How much more devastating for the petitioner could the prosecutor's 'devastating' argument have been than the death sentence the petitioner got without such argument.*

Cone, 243 F.3d at 978-979 (emphasis supplied).

The panel further made clear that, in context, counsel's errors were so egregious that they ensured a death sentence in the eyes of the jury:

> We can only imagine the effect on the jurors when Cone's defense

> counsel refused even to ask them to spare his client's life. They could only have inferred that Cone's counsel was, by his silence, acquiescing to the prosecutor's plea that Cone be sentenced to death. *See Stewart*, 140 F.3d at 1270. Cone may well have fared better if his counsel had left the courtroom entirely for the sentencing phase of trial. If that had occurred, the jurors could not have inferred, as indeed they must have, that counsel's knowing and purposeful silence was an implicit agreement that justice required that Cone be put to death. When a man faces the gallows and his attorney sitting next to him declines even to ask the jurors to spare his life in the name of simple mercy, the attorney ought to have a most compelling reason for failing to speak – one that would incline a reasonable observer to credit as a sentencing strategy that is legally and factually justified. *The reasons Cone's counsel has given are totally unreasonable, given the stakes. This was not 'strategic' representation; it was nonrepresentation of the most deadly sort.*

Id., 243 F.3d at 979 (emphasis supplied). As noted *supra*, in concluding, the panel then specifically discussed both Strickland and 28 U.S.C. §2254(d)(1) to conclude that habeas relief is mandated. Cone, 243 F.3d at 979.

Nothing about the panel's analysis is either incorrect or exceptional. The panel's conclusion in applying settled principles to the unique facts here was correct. Certiorari should be denied. See also U.S.S.Ct.R. 10.

V.
BECAUSE THE JUDGMENT BELOW MUST BE AFFIRMED ON NUMEROUS ALTERNATIVE BASES, THIS CASE PRESENTS A POOR VEHICLE FOR REVIEW

Finally, this case presents numerous alleged violations of Gary Cone's constitutional rights, violations which entitle him to habeas relief. See pp. 1-9, *supra* (detailing numerous constitutional violations occurring at trial). Because the lower

court judgment is correct in light of these additional constitutional violations, the court of appeals' judgment will not be affected by this Court's resolution of the unique, fact-bound right to counsel claim.[19] Similarly, this Court does not resolve constitutional issues unless necessary. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-347 (1936)(Brandeis, J., concurring). The writ, therefore, should be denied.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,

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[19]Gary Cone may defend the lower court's judgment on each alternative bases presented below, and he does so here, incorporating all grounds presented below and noted herein.

(10)

Supreme Court, U.S.
FILED
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No. 01-400

In The

Supreme Court of the United States

RICKY BELL, WARDEN,

Petitioner,

v.

GARY BRADFORD CONE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

JOINT APPENDIX

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Memorandum Opinion of the United States District Court for the Western District of Tennessee, filed May 15, 1998..... Pet. App. 39

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RELEVANT DOCKET ENTRIES

U.S. District Court
Western District of Tennessee (Memphis)

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* * *

2/13/97	4	NOTICE OF FILING DOCUMENTS by defendant Ricky Bell (addenda 1-4 placed in separate folders) (wbe)

* * *

7/1/97	71	PETITION FOR WRIT OF HABEAS CORPUS [placed in separate folder] (ehg) [Entry date 07/02/97]

* * *

8/1/97	74	RESPONSE/ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS by respondent Ricky Bell to [71-1] (placed in separate folder) (ehg) [Entry date 08/05/97]

* * *

10/14/97	97	MOTION by petitioner Gary Bradford Cone for evidentiary hearing (ehg) [Entry date 10/15/97]

* * *

10/14/97	99	REPLY TO RESPONDENT'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS . . . by petitioner Gary Bradford Cone re [74-1] [placed in separate folder] (ehg) [Entry date 10/15/97]

* * *

10/29/97	106	RESPONSE by respondent Ricky Bell to motion for evidentiary hearing [97-1] (ehg) [Entry date 10/30/97]

* * *

10/29/97 108 REPLY TO PETITIONER'S RESPONSE TO RESPONDENT'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS . . . by respondent Ricky Bell re [99-1] 2-vols. [placed in separate folder] (ehg) [Entry date 10/30/97]

* * *

11/17/97 115 REPLY TO RESPONDENT'S RESPONSE TO MOTION FOR EVIDENTIARY HEARING. . by petitioner Gary Bradford Cone re [106-1] (ehg) [Entry date 11/20/97]

* * *

5/15/98 136 ORDER DENYING MOTION FOR EVIDENTIARY HEARING AND ORDER OF PARTIAL DISMISSAL by Judge Jon P. McCalla. For the reasons set forth in this order, petitioner's motion for an evidentiary hearing [133-1] is denied, and the claims addressed in his motion are dismissed. (cc: all counsel) (gbr) [Entry date 05/18/98]

* * *

1/29/99 170 ORDER OF DISMISSAL ORDER DENYING CERTIFICATE OF APPEALABILITY ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH ORDER LIFTING STAY OF EXECUTION by Judge Jon P. McCalla . . . all of the claims raised in the Petitioner's petition for a writ of habeas corpus are either barred or meritless, and the Court Dismisses the petition. Additionally, the Court denies a

certificate of appealability, and Certifies that any appeal taken in this matter is not taken in good faith. Finally, the Court Lifts the stay of execution entered in this matter on March 7, 1997, dismissing case, stay lifted (cc: all counsel) (sk) [Entry date 02/01/99]

1/29/99 171 JUDGMENT IN A CIVIL CASE: by Judge Jon P. McCalla re [170-3] . . . It is so Ordered and Adjudged that, in accordance with the Order of Dismissal, entered 01/29/99, this case is Dismissed. (cc: all counsel) (sk) [Entry date 02/01/99]

2/12/99 172 MOTION by petitioner Gary Bradford Cone to alter or amend judgment [171-1] (ehg)

* * *

2/12/99 174 MOTION by petitioner Gary Bradford Cone for certificate of appealability (ehg)

* * *

2/26/99 176 NOTICE OF APPEAL by petitioner Gary Bradford Cone from Dist. Court decision [171-1] (ehg) [Entry date 03/01/99]

* * *

3/26/99 182 IMG ORDER GRANTING IN PART MOTION TO ALTER OR AMEND JUDGMENT by Judge Jon P. McCalla granting motion for certificate of appealability [174-1], granting motion for leave to proceed in forma pauperis on appeal [173-1], granting in part motion to alter or amend judgment [171-1] [172-1] : . . . the Court

Denies pet's request to reconsider its denial of habeas corpus relief. Pet has set no grounds warranting this extraordinary action. After further argument of the parties, however the Court reconsiders its earlier decision denying pet a certificate of appealabilty and Grants pet's request for a certificate of appealability as to his claim that electrocution would subject him to cruel and unusual punishment . . . the Court therefore declines to reconsider its denial of a certificate of appealability as to his other claims for relief. As the Court finds that pet presents an issue of substance upon appeal, the Court withdraws its earlier certification that an appeal in this matter would be frivolous. Accordingly, pursuant to FRAP 24(a)(3), pet may proceed in forma pauperis upon appeal. (cc: all counsel) [CH-Appeals Clerk] (yds)

4/7/99 183 AMENDMENT by petitioner Gary Bradford Cone to notice of appeal [176-1] including the Order Granting in Part Motion to Alter or Amend Judgment entered on 3/26/99. (ssh) [Entry date 04/12/99]

* * *

6/15/99 186 ORDER Entered: 6/10/99 from 6th Circuit re appeal [176-1], granting appellant's motion for a certificate of appealability. (ssh)

* * *

General Docket
US Court of Appeals for the Sixth Circuit
Court of Appeals Docket #: 98-5279

* * *

3/4/99 Death Penalty Case Docketed, with certificate of appealability and ifp denied in district court on 2/1/99. Notice filed by Appellant Gary Bradford Cone. Transcript needed: y (pje)

* * *

6/4/99 Appellant MOTION filed to grant a certificate of appealability, Motion filed by Robert L. Hutton for Appellant Gary Bradford Cone. Certificate of service date 6/3/99 [99-5279] (ac)

* * *

6/10/99 ORDER filed granting motion to grant certificate of appealability [1955155-1] filed by Robert L. Hutton [99-5279]. (pje)

* * *

4/7/00 FINAL BRIEF filed by Tonya G. Miner for Appellee Ricky Bell. Copies: 7. Certificate of service date 4/5/00. Number of Pages: 74. [99-5279] (ds)

4/7/00 FINAL BRIEF filed by Robert L. Hutton for Appellant Gary Bradford Cone. Copies: 7. Certificate of service date 4/5/00 Number of Pages: 117. [99-5279] (ds)

4/7/00 FINAL REPLY BRIEF filed by Robert L. Hutton for Appellant Gary Bradford Cone. Copies: 7 Certificate of service date 4/5/00 Number of Pages: 20. [99-5279] (ds)

* * *

9/12/00 CAUSE ARGUED on 9/12/00 by Paul R. Bottei for Appellant Gary Bradford Cone, Jennifer L. Smith for Appellee Ricky Bell before Judges Merritt, Ryan, Norris. [99-5279] (me)

* * *

3/22/01 OPINION filed: We AFFIRM the district court's refusal to issue a writ of habeas corpus with respect to the petitioner's conviction, but REVERSE the district court's judgment as to the petitioner's sentence. We REMAND to the district court with instructions to issue a writ of habeas corpus vacating the petitioner's death sentence due to the ineffective assistance of counsel at sentencing, unless the state conducts a new penalty phase proceeding within 180 days after remand, decision for publication pursuant to local rule 206 [99-5279]. Gilbert S. Merritt, Circuit Judge, James L. Ryan, Authoring Judge, Alan E. Norris, Circuit Judge. (pje)

3/22/01 JUDGMENT: AFFIRMED: REVERSED and remanded. (pje)

* * *

4/4/01 PETITION for en banc rehearing filed by Jennifer L. Smith for Appellee Ricky Bell. Certificate of service date 4/3/01. [99-5279] (blh)

* * *

5/11/01 RESPONSE to a petition for en banc rehearing [2333627-1] filed by Jennifer L. Smith. Response filed by Robert L. Hutton for Appellant Gary Bradford Cone. Certificate of service date 5/10/01. [99-5279] (blh)

6/1/01 ORDER filed denying petition for en banc rehearing [2333627-1] filed by Jennifer L. Smith [99-5279]. Gilbert S. Merritt, James L. Ryan, Alan E. Norris, Circuit Judges. (blh)

* * *

7/30/01 ORDER filed granting motion to stay mandate until 8/30/01 filed by Jennifer L. Smith [99-5279] Gilbert S. Merritt, Circuit Judge, James L. Ryan, Circuit Judge, Alan E. Norris, Circuit Judge. (pje)

* * *

12/20/01 U.S. Supreme Court letter filed granting petition for writ of certiorari, granting leave to proceed ifp [2422531-1] filed by Gary Bradford Cone [99-5279]. Filed in the Supreme Court on 12-10-01. (swh)

IN THE CRIMINAL COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE

STATE OF TENNESSEE, Appellee,	)	Cases Nos. 74902 74898 74899
v.	)	74900
GARY BRADFORD CONE, also known as "Gerald Mason Harmon", Appellant.	)	74702 74703

TRANSCRIPT OF THE EVIDENCE

State's Proof April 20, 1982

(Filed Jan. 28, 1983)

BEFORE: THE HONORABLE JAMES C. BEASLEY, PRESIDING JUDGE

* * *

[1631] VALEREE H. CONE, called as a witness by the Defendant, after first having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DICE:

* * *

[1643] Q. I'd ask you once again, if I might, Mrs. Cone, did your son, Gary, go to Vietnam?

A. He did.

Q. All right. And he was over there a year. Is that correct?

A. That's right.

Q. All right. Now, –

A. A little bit better.

Q. All right. I'd ask you, please, ma'am, if when he came back, what changes that you noticed about him?

A. Well, he never kept appointments with his friends, and he seemed to be very uptight most of the time, and in a very big hurry to get everything done that he even went at.

Q. All right. Did he suffer from nightmares?

A. He definitely –

MR. STROTHER: I'm going to object to leading.

Your Honor.

[1644] Q. Let me ask you this. What else did he suffer from?

A. From acting like, at times, he was in another world.

Q. All right. And I'd ask you, please, ma'am, if he talked to you at all –

MR. STROTHER: I'm going to object to leading. Your Honor.

THE COURT: Well, let me hear the question. Go ahead.

MR. DICE: May I be permitted – Well, all right.

Q. When you say he acted in another world, how did he sleep at night?

A. Very badly.

Q. What do you mean by "very badly", Mrs. Cone?

A. Restless and sometimes hollering.

Q. Okay. And, specifically, did he ever holler or talk to you about body bags, or experiences –

A. He definitely did.

Q. All right. What was that related to?

A. About them flying the bodies back and him having to help handle them and how terrible it was, and the condition the bodies were in at the time.

Q. All right. And what about him, was he outgoing when he came back?

A. No, he wasn't.

Q. Okay. How was he?

A. Well, as I say, he didn't keep appointments a lot [1645] of times, and that wasn't Gary, you know. He was always punctual before then. For instance, him and his first cousin and one of his first friends – which was

another girl – which lived just a little piece from me – was supposed to go to a picture show, and he sure didn't show for the – He went off with another friend and was supposed to be back in a little while, and he did not show.

Q. All right. May I ask you this, Mrs. Cone. What about his general demeanor? Did he laugh? Did he cry? Did he – What did he do?

A. No, no, he did not laugh, but he did not cry either. He acted like, you know – He was just stoning it, you know. I know what – I know you don't understand exactly what "stoning" means, but, you know, just holding it in.

Q. Okay. Prior to the time when he went to Vietnam, was your son – How did he perform in school?

A. Very good. Very good.

* * *

[1657] MATTHEW JAREMKO, Ph.D., called as a witness by the Defendant, after first having been duly sworn was examined and testified as follows:

* * *

[1670] DIRECT EXAMINATION

BY MR. DICE:

Q. All right. Dr. Jaremko, I would ask you if you have performed a patient history on your patient, and my client, Gary Cone?

A. Yes.

Q. All right. And so that I might ask you this, have you made a diagnosis of Mr. Cone in your examination of him?

A. Yes.

Q. All right. And specifically, would you tell the jury whether or not he is suffering from any diseases which affect the mind?

A. Yes.

Q. And what are those diseases, and what are the basis for your findings?

A. It is my opinion that Mr. Cone has a combination of two disorders: One is a substance abuse disorder, but that is superimposed upon a post-traumatic stress disorder. The substance abuse disorder – I'll get to in a minute, but I believe that the post-traumatic stress disorder is the major cause for why he got involved in drugs. This post-traumatic stress disorder is a result of him being exposed to the trauma of combat and the continuing trauma that occurred after he came back as a Vietnam Veteran from an unpopular war, in which he became disenfranchised from the [1671] society at large, causing him a great deal of personal stress, social maladjustment.

The four features of a post-traumatic stress disorder that Mr. Cone has manifested over the years has been, of course, the exposure to the trauma of combat; but, secondly, the reliving of the combat trauma. Mr. Cone manifests for some time, nightmares that are related to Vietnam – his being in Vietnam. He manifests what are called "flashbacks", that is, thinking about – perceiving

himself being back in combat situation. The third category of this disorder is an emotional distance and a social distance from society at large, in which has a large change in his value system – what he perceives as being important. After suffering from the exposure to the combat trauma he apparently has changed from perceiving things like work and success and discipline as being important dimensions in his life to other kinds of values. He considers now things like kindness, pleasure, justice, truth, to be more important than acievement [sic]-oriented values. In other words, he's distant from – he's at odds with the traditional values that most of us are socialized by, because of his exposure to the Vietnam combat situation.

Then the fourth category of this disorder is stress related symptoms, whether they be depression, nervousness, sleep disorders – he has manifested all of these problems.

[1672] Now, I believe that he then started to use drugs sometime during his tenure in Vietnam, and has continued to use drugs as a self-way to self-medicate against the stress that he feels from having been a victim of the combat trauma. So, in summary, it's my opinion that he has a combination of a substance abuse disorder that is a result of self-medication from the stress related disorder he incurred when he was in Vietnam.

Q. Why do you say that the substance abuse disorder is an outgrowth of his service in Vietnam, Dr. Jaremko?

A. There is no evidence from my interview, or other's interviews of Mr. Cone, that he used drugs before he went to Vietnam.

* * *

[1674] Q. Do you have an opinion as a clinical psychologist as to whether or not your patient, and my client, was suffering from a mental illness in August of 1980?

A. Yes, I do.

Q. And what is your opinion in that regard?

A. Yes, he was. My opinion is that he was.

Q. All right. And would that illness that he was suffering from render him substantially incapable of conforming his conduct to the requirements of the law?

[1675] A. I believe it would.

Q. All right. And I would ask you whether or not that illness is such to prevent his knowing the wrongfulness of his conduct?

A. I can't say about that.

Q. All right. I would ask you, Dr. Jaremko, whether or not Mr. Cone has expressed to you any remorse for his involvement in the killings of a couple known as Cleopatra and Shipley Todd?

A. Yes, he has. He's said that he was very sorry that that happened.

Q. All right. Now, is it your statement as a clinical psycholgist, based on a reasonable degree of either psychological certainty or psychiatric certainty, that he is suffering from a mental disease or defect?

A. It is my opinion, yes.

* * *

Defense Proof April 21, 1982

[1715] JONATHAN J. LIPMAN, Ph.D., called as a witness by the Defendant, after first having been duly sworn was examined and testified as follows:

VOIR DIRE EXAMINATION

BY MR. DICE:

Q. If you will, please, sir, will you state your name.

A. Jonathan Joseph Lipman.

Q. And Dr. Lipman, can you tell me where you live?

A. Here in Memphis, Tennessee.

Q. And I'd ask you whether or not you have a professional title, such as lawyer, doctor, what-have-you.

A. I'm a neuropharmacologist, sir.

* * *

[1722] DIRECT EXAMINATION

BY MR. DICE:

Q. Dr. Lipman, I would ask you whether or not you know the young man to my left, and to whom I am pointing?

A. Yes, sir.

Q. And is his name Gary Cone?

A. Yes, sir.

Q. Have you and I consulted together, and have you consulted with him?

A. Yes.

Q. All right. Is he your patient?

A. Yes.

Q. All right. Do you know Dr. Matthew Jaremko?

A. Yes, I do.

Q. And is fair of me to say that you and I and he have discussed the case of Gary Cone together?

A. Yes, sir.

Q. All right. I would ask you, Dr. Lipman, whether or not you have done an examination and a patient history on Gary Cone?

A. Yes, sir.

Q. Where were your interviews conducted, Dr. Lipman?

A. Here in this Justice Complex.

Q. All right. And, if you will, sir, did you bring a report with you of your studies and conclusions as regards [1723] to your patient, Mr. Cone?

A. Yes, I did, sir.

Q. All right, sir. I would ask you, if you will, Dr. Lipman, to explain to the ladies and gentlemen of the jury when you first interviewed Mr. Cone, and what you studied, and exactly what was done in that particular proceeding.

A. When I first interviewed Mr. Cone?

Q. Yes.

A. In February of this year, I interviewed Mr. Cone, here in the Justice Complex, with the intention of obtaining a drug history from him in the context of his life. This was a three hour interview, I believe, during which I formulated a pattern – a very brief and rough pattern – of the way that he had been using drugs since the age of eighteen through to the present time.

I analyzed his drug pattern and made some assumptions and some conclusions with regard to the way that he had been using drugs, and the way that he'd been behaving.

Q. What was that drug pattern?

A. As first determined, in that initial interview, he was what we call a polydrug user, he used more than one drug. His principal drug was amphetamine, in many of its different forms, including cocaine, which is amphetamine-like as regards its action on the brain. And this use

was combined [1724] with the coincident use of morphine-type drugs – opiates, we call them – which he would use interspersed with the amphetamine-type doses to reduce the anxiety producing effects of the amphetamine-type drugs.

Q. When you say "amphetamine", do you know a street term in your studies for amphetamines?

A. The commonest word is "speed".

Q. Okay, And I'd ask you, Dr. Lipman, when did your patient and your drug history tell you that this drug usage began, and what was the nature of it at that time?

A. His drug history seemed to be absent up to the age of eighteen. In 1966 was his first exposure to drugs. He was introduced to Hashish, which is *cannabis resin*, in the Army in Germany, where he was stationed, and later in the Army, also, whilst in Vietnam. He was there introduced to Opium, which contains morphine, and to amphetamine. He was apparently issued this amphetamine for 53 consecutive nights whilst on guard duty to maintain alertness. And this was his first exposure, which was of the opiate-type and amphetamine-type. And this pattern continued throughout the remainder of his history, as I took it.

* * *

[1758] Q. In August of 1980, in your opinion, was your patient suffering from a disease called chronic amphetamine psychosis?

A. Yes, based on the drug dosage that he was taking.

Q. All right.

A. And the symptoms thereof.

Q. Would chronic amphetamine psychosis be such as to prevent his knowing the wrongfulness of an act?

A. Yes.

Q. Would it be such as to render him substantially incapable of conforming his conduct to the requirements of law that he's charged of violating in this case?.

A. Uh-huh, yes.

Q. Would it be such that he would be suffering, in fact, from a mental illness – albeit drug-induced – at the time of the commission of the crime?

A. It is a mental illness, yes.

Final Argument
April 22, 1982

* * *

[2033] MR. DICE: We made an opening statement. We made an opening statement, and in that I told you that I would show you that my client, Gary Cone, was an Army brat, and by that I meant that he came from an Army family. That he was graduated from a school in Lake Village, Arkansas. And something that we talked about in that opening statement when we talked to you is that we would show by uncontroverted proof that Gary Cone was a normal individual, a stellar scholar, a member of a family unit before he went off to a [2034] faraway

place called Vietnam. And if you remember, I talked to so many of you about do names like Cameron Bay and Danang and Bien Hoa mean anything to you in asking you about your experiences in Vietnam. Have you ever heard of the Vietnam Veterans Center? And almost every one of you, but for one or two, said, no, we've never heard of that. Have you ever heard of the Vietnam Stress Syndrome, or Post-traumatic Stress Syndrome? And almost all of you said, no, we've never heard of that.

And I asked you, have you heard of a place called the Gulf of Tonkin. And I think there was only [sic] member of this jury who had.

But I told you that something had caused a change. And I told you that we would deal with two Gary Cones. One, I submit, is this Gary Cone [demonstrating photo] pictured as he was many years ago. And one that I submit is this Gary Cone [demonstrating photo] pictured as he was in August of 1980. What caused him to be here, as one person, portrayed as a deliberate and cool and premeditated killer by the State, and what caused him to change from this?

* * *

April 23, 1982

PUNISHMENT AND SENTENCING HEARING

[2112] THE COURT: All right. Does the State care to make an opening statement?

MR. STROTHER: Very, very brief one, Your Honor.

THE COURT: You may proceed.

MR. STROTHER: Ladies and gentlemen, we are, as I'm sure you're aware from the opening voir dire,

at the stage in this proceeding where it will be your duty and responsibility to fix the punishment in this case. The State, in its original voir dire – that seems virtually an eternity ago, –

REPORTER: Judge, I'm not hearing Mr. Strother.

THE COURT: She's not hearing you, General.

MR. STROTHER: I'll try to move down to another microphone where hopefully she can pick me up.

We went over with you the law which is applicable, and I don't want to take much of your time now; simply to remind each and every one of you that you promised both us, and frankly, the Defendant, that you'd base your verdict on the law and the evidence, and on those two things alone. And I submit to you that law, the law His Honor's going to charge you is that: (reading)

> "– If the jury unanimously determines that at least one statutory aggravating circumstance [2113] or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstance, the sentence shall be death. –"

And I submit to you that His Honor is going to charge you that you may consider – of course, the proof that you've heard already in this case, you may consider it both for aggravating and for mitigating circumstances. And that you are also to consider the proof which now will be presented to you. I know the State is going to present some, and it will be up to the Defendant, if they choose, to put on any. And all I call upon you to do is to

go back and follow that law. And I submit to you – and I can't say what the Defense will prove at this point, or what might come in as far as the Defendant's is concerned. But I submit to you that the State will prove four aggravating circumstances, either at this stage or we have previously proven them.

First, we'll prove that: (reading)

"– The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person. –"

We will prove to you that he was convicted not of one but of three robberies committed with a deadly weapon in the [2114] state of Oklahoma.

We will further prove to you that:

"– The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder. –"

And to be honest with you, we're not going to put on any more proof to that effect. But you've heard the facts, you've heard the circumstances. Obviously, in Mrs. Todd's case, there was a great threat of death to Mr. Todd. But during this sequence, during this time frame, during this act of murder, wasn't Mrs. Tuech put in that same position? Wasn't there a real likelihood of her death if she hadn't gotten that door closed? It's up to you. I don't make that decision. You do.

I further submit to you that we will prove:

"– The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind. –"

And further, we will prove:

"– The murder was committed for the purpose of avoiding a lawful arrest. –"

It was part of this man's attempt to escape the police network which was engulfing that area of the town at this time.

Thank you.

THE COURT: Mr. Dice.

[2115] MR. DICE: May it please the Court, and ladies and gentlemen of the jury: We talked about on the opening statement before about what the procedure in this courtroom would be if we got to this stage in the trial. I think all of us are fairly well familiar with that.

So, just as a brief refresher on that, as General Strother says, in this stage – the State is entitled to opening and the Defense is. Proof can be put on by either side as to aggravating and mitigating circumstances, and then after that is done the State has the right of making a closing argument, and so does the Defense.

What we're going to do in this particular phase of the case, as I've said to you all in the beginning of this trial, is that we will deal in death, or, we will deal in life. That is

exactly where we are, and certain circumstances are going to be pointed out to you.

I agree with the General that the proof – I believe His Honor will tell you that was presented in the main portion of this case can be considered by you in considering both aggravating and mitigating circumstances. I'd also would make these comments in regards to that.

The Defense read to you what mitigating circumstances were present. The Defense has put on proof of those mitigating circumstances during its case, and I would like to review those with you.

[2116] We say that the mitigating circumstances which will apply in this particular case are as follows.

We say that the murder involved in this particular case was committed while the Defendant was under the influence of extreme mental or emotional disturbance.

We say that because Dr. Jaremko testified that in his opinion – and I realize there's been conflicting testimony – that he was suffering from a psychosis that continues until present. In his case, Vietnam Veteran's Stress Syndrome. From the standpoint of Dr. Lipman, of what he called Amphetamine Psychosis. Dr. Bursten, of course, had his opinion. Dr. Hutson had his opinion.

We also say that the mitigating circumstance of the Defendant acting under the extreme duress in this particular case can be considered by you, as follows.

That the Court will charge to you that one of the mitigating circumstances which can be considered by you in a case of this nature is whether:

> "– The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment. –

[2117] And in going back at that, there's been a lot of issues brought up before all of you in terms of whether or not my client is the junkie and drug addict that we say he is.

And the General said that he'll prove that my client was incarcerated for three robberies in Oklahoma, and I guess he'll present some further proof on that. I don't know. But if you remember, in considering this mitigating circumstance and remembering the proof, when he was arrested in Pompano Beach, according to Agent Flynn, he was arrested robbing a drug store, seeking drugs, and according to Officer Roby, looking for syringes. And I suggest that you consider whether or not that action is the action of an addict looking for his source of supply.

And I again ask you to consider that particular mitigating circumstance in looking at this – weighing and balancing of the mitigating circumstances.

I suggest to you that Dr. Jaremko stated, in his interview with my client, my client has expressed remorse for his conduct. That is not a statutory mitigating circumstance, but it is a circumstance that you can consider, as the General says, under the rule.

And I asked all of you, each and every one of you, to look at the whole man in this case, when we began. And I

suggest to you that proof has been put in this record [2118] that he is an honorably discharged veteran of his country, and I ask you to look at that in light that there is no evidence of any kind, of any nature, in this record, other than the fact that his drug abuse began under the stress and strain of combat service. And I suggest to you that that is a mitigating circumstance.

Yesterday, during the heat of battle, General Strother referred to my client as an animal. Now, we're in the position here on opening statement of talking about the alternatives that are available. I suggest to all of you that we are not animals in this jury box, and I suggest to you that animals do not kill if there is an alternative. And there is good reason for maintaining life if you look at the whole man in this particular case.

The position that we're in, perhaps again, our ethics have been questioned, the Defense team. If we're unethical to seek mercy, then I am unethical. But mercy is – it's a double blessing. It's a blessing to the person who gives, and it's a blessing to the person who receives. And I would say to you that mercy – if you consider life under the mitigating circumstances, and the aggravating circumstances in this case – raises you above the State, raises you above the King, if you will. It raises you to the level of God.

And I ask you to consider all of those facts as [2119] you decide whether or not you will kill Gary Cone. Now, under the proof, perhaps, the theory of the State will be that Gary Cone has put himself in this position. But I submit to you there are victims in this case called the

Todds, a fine elderly couple. There is also a victim in this case, of society, named Gary Cone. Thank you.

THE COURT: You may call the first witness.

MR. PATTERSON: James A. Blackwell, please.

STATE'S PROOF

J. A. BLACKWELL, called as a witness by the State, and after first having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PATTERSON:

Q. State your name for the Court and jury, and spell your last name for the record, please.

A. J. A. Blackwell. B-L-A-C-K-W-E-L-L.

Q. And by whom are you employed?

A. Shelby County Government.

Q. And in what capacity?

A. As Criminal Court Clerk.

Q. As part of your duties as the Criminal Court Clerk, [2120] are you custodian of the records of the Courts of Shelby County?

A. That is correct.

Q. And I'll ask you, pursuant to the State's request, did you bring certain records concerning a Gary Bradford Cone to Court with you?

A. I did so bring.

Q. And do you have them with you?

A. I do.

Q. I'll ask you, among your records, do you have a conviction of Gary Bradford Cone, also known as Gerald Mason Harmon?

A. I do so have.

Q. Referring to your records, under CRF 72-1431, do you have a conviction of a Gary Bradford Cone for robbery with a firearm?

A. (Referring to records) I do have.

Q. And under what date was this conviction?

A. It would be of the date August 9, 1972.

Q. And what was the sentence?

A. The sentence, 25 years.

Q. And referring to CRF 72-1476, –

A. (Referring to record) I do have that record.

Q. – do you have a conviction of a one Gary Bradford Cone?

A. I do have.

[2121] Q. And what is the conviction, and the date of the conviction?

A. The date, August 9, 1972. 25 years.

Q. And for what offense?

A. For the offense of robbery with firearms.

Q. And would you refer to your records as far as CRF 72-1477.

A. (Referring to record) I have that record.

Q. And does it show a conviction on one Gary Bradford Cone?

A. It does.

Q. And for what was he convicted, and the date?

A. For robbery with firearms, on the date of August 9, 1972.

Q. And what was his sentence?

A. The sentence was for a period of 25 years.

MR. PATTERSON: May it please the Court, I would like to make as State Exhibit No. 71 the record of one Gary Bradford Cone, being made part of the record.

THE COURT: What number would it be, Laurel?

REPORTER: 71.

THE COURT: 71.

MR. DICE: I'd like to see the exhibit, if I might.

THE COURT: Certainly, Mr. Dice.

MR. PATTERSON: If you would remove the exhibit from [2122] the papers, I believe there are other papers there.

(Witness tendered documents to Defense for examination. Documents then returned to witness by Defense.)

MR. PATTERSON: Excuse me, I have requested that be made State Exhibit No. 71.

MR. DICE: No objection.

THE COURT: May be received in evidence and marked Exhibit 71 to the record.

(State's Exhibit No. 71 marked and filed)

BY MR. PATTERSON: (Continuing)

Q. Mr. Blackwell – Excuse me, if you would leave that out. Mr. Blackwell, is that we call – Is that a certified copy of a record from another state?

A. Yes, this is a certified copy of the record, as certified by the Clerk of the Court from Oklahoma County, Oklahoma, I believe is the – the Court Clerk for Oklahoma County, Oklahoma. That is correct.

MR. PATTERSON: I pass the witness.

(end of page)

[2123] CROSS-EXAMINATION

BY MR. DICE:

Q. Mr. Blackwell, how long have you been the Shelby County Criminal Court Clerk, please, sir?

A. 1982 is my 30th year.

Q. 1982?

A. Yes, sir, this started my 30th year.

Q. And when you're certifying to a Court record, so these ladies and gentlemen of the jury understand it, you

are certifying to it that the records are accurate for the material contained therein, are you not?

A. That is what is furnished here, that is correct.

Q. And as part of that record, does it not say as to Gary Cone that he served in Germany and Vietnam, where he was awarded the Bronze Star?

(Pause – Witness examining records)

MR. DICE: May I approach the witness, Your Honor?

THE COURT: Yes. Sure.

(Pause)

A. I believe this is it here. Yes. Yes, it's part of the Classification Summary. It shows on a Gary Cone, and the Docket No. 84931-1, showing the military service: (reading)

> "– Gary Cone entered the U.S. Army in November, 1966, at Little Rock, Arkansas. He served in Germany and Vietnam, where he was awarded the [2124] Bronze Star. He was a supply sergeant, and reached the rank of E-5. He was honorably discharged in July, 1969. –"

Q. All right. Mr. Blackwell, all three of the convictions that you have testified to occurred on the same date. Is that correct?

A. The convictions were on the same date. That's correct.

MR. DICE: Nothing further.

THE COURT: Anything further of Mr. Blackwell?

MR. PATTERSON: Yes.

REDIRECT EXAMINATION

BY MR. PATTERSON:

Q. Mr. Blackwell, you refer to those records. Are the indictments – the Oklahoma indictments contained in the file?

A. They are.

Q. If you would, locate them and give – First, if you'll just locate the first indictment.

A. (Witness complies).

Q. What is the date of the offense on the first indictment?

A. The date of the offense on the first indictment: On or about the 28th day of December, 1971.

Q. And if you'll refer to the next indictment.

[2124] A. (Witness complies). The second indictment, or information, is: On or about the 7th day of March, 1972.

Q. And the third indictment.

A. (Witness complies). On or about the 22nd day of May, 1972.

MR. PATTERSON: Thank you. We pass the witness, again.

MR. DICE: I have nothing further. Thank you, Mr. Blackwell.

THE COURT: Thank you, Mr. Blackwell.

THE WITNESS: Yes.

MR. PATTERSON: I believe you'll need to leave the exhibit here, Mr. Blackwell.

THE WITNESS: Yes.

(Exhibit tendered to State)

MR. PATTERSON: Thank you.

*** (WITNESS EXCUSED) ***

THE COURT: Next witness.

MR. PATTERSON: Mr. Holder, please.

(end of page)

[2125] JAMES L. HOLDER, recalled as a witness by the State, after first having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PATTERSON:

Q. I think the jury has seen you before, but state your name, please.

A. James L. Holder. H-O-L-D-E-R.

Q. By whom are you employed?

A. The Memphis Police Department.

Q. And what is your job with the police department?

MR. DICE: I'll stipulate to his credentials again, if the Court please.

THE COURT: You might just –

Q. What is your job, what do you do?

A. I'm a latent fingerprint examiner.

Q. You can classify and identify fingerprints – latent fingerprints?

A. Yes, sir.

Q. And also known fingerprints. Is that correct?

A. Right.

Q. I'd like to hand you what's been heretofore introduced as State Exhibit No. 65, and also, if you will, give him State Exhibit No. 71. (Pause) What is [2126] State Exhibit No. 65? I believe it's been introduced as the known prints of a individual, of Gary Bradford Cone, also known as Gerald Mason Harmon. What is that exhibit?

A. This is a set of inked finger impressions – original finger impressions, and inked palm impressions. It's several cards. Also inked foot impressions.

Q. Fine. Now, if you'll refer to State Exhibit No. 71, I'll ask you, are there any inked impressions contained within that exhibit?

A. There is a copy – I would assume it's a xerox copy, it appears to me to be a copy – of a set of rolled inked impressions, finger impressions.

Q. Is there a person's name on those impressions?

A. Yes, sir. (reading) "Gary B. Cone".

Q. Would you, Officer Holder, compare the prints on State Exhibit No. 65 with the prints of State Exhibit No. 71, then I'll ask you whether or not, are these the same prints of the same individual.

A. All right. [Witness complies, using magnifying glass] Yes, sir, these impressions are the same. I compared No. 6 fingers on each set, which would be the left thumbs, and I found them to be the same.

Q. Is your opinion, then, that the inked impressions on State Exhibit No. 65 and the inked impressions on State Exhibit No. 71 are of the same individual?

[2127] A. Yes, sir, that's correct.

MR. PATTERSON: Pass the witness.

MR. DICE: We have no questions.

THE COURT: Thank you, Mr. Holder.

*** (WITNESS EXCUSED) ***

THE COURT: Next witness.

MR. STROTHER: Officer Mike Stovall.

(end of page)

[2128] C. M. STOVALL, recalled as a witness by the State, after first having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STROTHER:

Q. State your name, please, and spell your last name for the record.

A. Officer C. M. Stovall. S-T-O-V-A-L-L.

Q. It may seem like a long time ago, but you're the same Officer Stovall who testified about a week ago in this same case. Correct?

A. Yes, sir.

Q. And you were employed by the Memphis Police Department on August 9, 1980. Is that correct?

A. Yes, sir.

Q. On August 9, 1980, out there on Hawthorne and the streets in midtown, were you attempting to make an arrest?

A. Yes, sir.

Q. Who were you attempting to arrest?

A. Gary Bradford Cone.

Q. And for what were you attempting to arrest him?

A. Armed robbery.

Q. After that, and subsequent – Did you, in fact [2129] make that arrest, or were you able to make that arrest at that time?

A. No, sir.

Q. After that time, were officers of the Memphis Police Department continuously, until his apprehension, –

MR. DICE: May we approach the bench? I object.

THE COURT: Yes, sir.

(Whereupon, a bench conference was held on the record in the presence of the jury but out of the hearing of the jury, and the following proceedings were had:)

MR. DICE: I object to the relevancy of it, and I object, if Your Honor please, to the leading. I don't understand where we're going here.

THE COURT: I think I understand where he's going, but I'll sustain the objection to leading.

(Said bench conference having been completed, the following proceedings were had in the presence and hearing of the jury:)

BY MR. STROTHER: (Continuing)

Q. After you were unable to make an arrest at that time, did you, or to your knowledge anyone else, make any [2130] further attempts as far as an arrest is concerned?

A. Yes, sir. It was – I don't know how many police officers, it looked like the whole force was out there trying to arrest him.

Q. And do you know how long that continued or how long there was an attempt made?

A. It lasted all through the night.

Q. And what about the following day?.

A. The next morning, we got another tip that he was trying to enter another lady's house –

MR. DICE: If Your Honor please, I object. I object to hearsay.

THE COURT: Well, yes, I'll sustain the objection.

You can't consider that for the purpose of proving or establishing evidence that he did, in fact, attempt to enter anyone's house. Do you understand? That's hearsay. And I'll sustain the objection. You couldn't consider it.

Q. If I might, I'm just trying to ask you if you, personally, and other officers, within your own personal knowledge, – Do you understand what I'm saying?

A. Yes, sir.

Q. – attempted to make an apprehension?

A. Yes, sir.

Q. And did that continue?

[2131] A. Continued the next day, also.

Q. And did it continue until the apprehension of the Defendant in the state of Florida?

A. Yes, sir.

MR. STROTHER: That's all I have, Your Honor.

MR. DICE: Statements, if any?

MR. STROTHER: You've already been furnished with all the ones I have, Mr. Dice.

MR. DICE: Okay. Nothing further.

THE COURT: Thank you, Mr. Stovall.

*** (WITNESS EXCUSED) ***

MR. STROTHER: Officer Bert Allen.

(end of page)

[2132] C. B. "Bert" ALLEN, recalled as a witness by the State, after first having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STROTHER:

Q. State your name, please.

A. Bert Allen.

Q. By whom are you employed?

A. Memphis Police Department.

Q. Were you so employed on August 9, 1980?

A. Yes, I was.

Q. Did you on that date have an occasion to attempt to make an arrest?

A. Yes, sir, I did.

Q. Who were you attempting to arrest?

A. I was attempting to arrest this male white, Gary Bradford Cone.

Q. Were you successful in making that arrest?

A. No, sir, I was not.

Q. For what charge were you going to arrest him?

A. I was going to arrest him for robbery, armed robbery.

MR. STROTHER: Pass the witness, Your Honor.

MR. DICE: I have no questions of Officer Allen.

THE COURT: Thank you, Mr. Allen.

[2133] *** (WITNESS EXCUSED) ***

MR. STROTHER Officer Jimmy Hammers.

JIMMY HAMMERS, recalled as a witness by the State, after first having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STROTHER:

Q. State your name, please.

A. Jimmy Hammers.

Q. And I think, obviously, you are the same officer who testified earlier in this case that on August 13, 1980, you were one of the first officers to enter the house of Mr. and Mrs. Todd. Is that correct?

A. That's correct, sir.

Q. And at that time you observed the conditions within that house, did you not, Officer?

A. Yes, sir, I did.

Q. And you did observe the condition, location and positioning of the bodies in that house and what had occurred to them, did you not, Officer?

A. Yes, sir.

Q. I'd like –

[2134] (Pause – Group of photos tendered to Defense)

MR. DICE: May we approach the bench, and, more specifically, may we have the jury out, Your Honor?

THE COURT: Go to your room, ladies and gentlemen. Don't discuss the case. We'll get you back in – Well, we may get you back in or we may send you to lunch, I don't know, but one or the other, shortly. Don't discuss the case.

(Whereupon, the Court excused the jury from the courtroom, after which the following proceedings were had out of its presence:)

MR. DICE: If the Court please, I would like the Sheriff to assist me in passing – I'd like those passed to the bench, please, sir.

BAILIFF: Oh, I'm sorry, I didn't understand you.

(Group of photos tendered to Court)

MR. DICE: I think Your Honor has already ruled on those particular photographs, and that is what is attempting to be passed to the witness, and I would strenuously object, if the Court please.

THE COURT: Well, let's let him pass them out of the presence of the jury and see what he wants to do with them.

MR. DICE: Yes, sir.

[2135] BY MR. STROTHER: (Continuing)

Q. Officer Hammers, –

THE COURT: Those are the pictures that I have excluded during the trial, –

MR. DICE: Absolutely.

THE COURT: – for the record. All right.

MR. STROTHER: Your Honor, for the record, those are not the photographs which you excluded on a prior occasion, because I think those photographs are still with the clerk and still a part of the record in this case.

These are additional photographs which I had contained in a group of photographs of the scene, but they are – and my only question –

THE COURT: If they are not, they are just about identical to them.

MR. STROTHER: Well, if I –

THE COURT: They may not be, but they certainly appear to be, you know, – I'm not – They're close shots.

MR. STROTHER: I think that in all probability they are almost identical to those, yes. But they are not –

THE COURT: Well, okay. I'll withdraw – I should have kept my mouth shut, and let you-all prove your record but – We'll just let you go right ahead.

BY MR. STROTHER:(continuing)

Q. Do those photographs truly and accurately portray

[2136] The conditions of the bodies as you found them, of the Todds, on August 13, 1980?

A. (After examining photos) Yes, sir, they do.

Q. And do they show, what in your opinion might be the results of a heinous, atrocious, cruel murder that would evidence depravity of mind?

A. Yes, sir, I'd say they do.

MR. STROTHER: That's all, Your Honor.

MR. DICE: I'm going to renew my objection, if Your Honor please. There's nothing about those bodies – and we go back to this. The bodies lay in an un-air conditioned home, if the Court please, for some four days. They became bloated, according to the testimony of the doctor, because of those conditions, et cetera. They're not representative of the conditions of the bodies immediately after blows were applied.

I again come back to the prejudicial effect, and that the Attorney General is deliberately trying to incite the passion and caprice of the jury. And if he wants to ask him whether or not he thinks this was a heinous crime, et cetera, I think the jury can figure that out under Your Honor's instructions to them. But there's only one purpose for those pictures, if the Court please, and that's to incite this jury. I think we all know that.

THE COURT: Well, I don't have it out here, but [2137] there's a case just recently came back on this very proposition. The Supreme Court reversed it, on another sentencing hearing, on this heinous crimes, and so forth, and it's got to be might close. Are you all familiar with the case? Just the last week. It came back –

MR. PATTERSON: No.

MS. STROTHER: Your Honor, I've been down here preparing this case for the last two weeks –

THE COURT: Well, I say last week, it's been a short period of time that I saw it, and it's the very proposition that – While there were other legitimate, the supreme Court said, aggravating factors, they said we are not going to allow a death penalty to stand when there's a questionable aggravating factor, or one that they didn't feel would support it. And they didn't feel that that heinous proof beared it up to the United States Supreme Court decisions on it.

Now, I'm not going to get into that now. I may have to get into it at the appropriate time, but –

MR. DICE: Well, I'm just saying that's a question for the jury to determine, –

THE COURT: I understand, –

MR. DICE: – not for him to determine.

THE COURT: – I understand, and I'm – I don't even know where we're going yet. I'm going to get into that [2138] as to what specific aggravating circumstances we're talking about, as going to the jury.

But – I see nothing, for the record, in ruling upon your objection to these pictures being passed to the jury, I see nothing which tends to establish the – And maybe the General can show me where it does, as to establish that this is a heinous crime – And don't misunderstand me. I think that as a human being and as a – I have one idea about what's heinous, and another when I'm sitting as

judge of this Court, and the classification that's intended by the multiple decisions of the appellate Courts of this country, including the Untied States Supreme Court and the Supreme Court of the State of Tennessee, as to what is a heinous crime.

Quite frankly, the Court feels that these pictures show a very distasteful, very pathetic condition of two bodies. But other than the fact that they are covered with blood, I don't see anything that proves a heinous of the crime, General, I really don't. I think that your probative value is grossly outweighed by these photographs.

Now, I'll be glad to hear what you're saying beyond that, but that's the way I view it.

MR. STROTHER: Well, Your Honor, my position is – Well, I'll be happy to say what I'm saying, and I'll certainly abide by Your Honor's ruling. But my position. [2139] very simply, is this: That, yes, you can do something to a jury when you pass gory photographs to them during the guilt or innocence phase of a trial, and the concept that I've always gotten from those cases is that you are influencing their decision on the issue of innocence or guilt of the defendant.

Now, we're past that stage.

THE COURT: I understand that.

MR. STROTHER: We're at a whole different stage in this proceeding. And a stage where I think the jury has a right to see – a right to see – just exactly what that man did out there.

THE COURT: On what basis?

MR. STROTHER: On the basis for them to make their decision: Is this crime a result of depravity of mind of the Defendant? Is it atrocious?

THE COURT: In accordance with the definition of "atrocious" and "depravity of mind" as set by the Supreme Court?

MR. STROTHER: Your Honor, I think, ultimately, it is a jury who determines –

THE COURT: Well, that may be where we –

MR. STROTHER: – whether or not those things are met. I mean, that's the law –

THE COURT: That's not what the Supreme Court of [2140] this state just got through saying, General.

MR. STROTHER: Well, Your Honor, I'm sorry, I do not have the advantage of having seen that case. But I think – Well –.

THE COURT: Well, I think that you – I'll be glad to consider any law that will allow me just to let the jury look at a picture, such as this, and make a determination as to whether or not that crime is heinous and indicates depravity of mind. I'm going to have to look at some cases, and I'll give you the opportunity to show me some that you feel would support your position.

But I do not feel they're admissible for that purpose at this point. I'd be glad to consider the matter further.

MR. STROTHER: Your Honor, I think this case has gone just as long as it needs to go. I'll withdraw my offer of proof.

THE COURT: Well, you know, that's up to you.

MR. STROTHER: That's exactly – I –.

THE COURT: Yes, I understand. Okay.

We'll recess for lunch and we'll resume at 2 o'clock. Take the jury to lunch.

*** (WITNESS EXCUSED FROM STAND) ***

[2141] (Whereupon, court recessed at 12:55 p.m., resuming its session at 2:10 p.m., and the following proceedings were had out of the presence of the jury:)

THE COURT: You can bring them in.

General. –

MR. STROTHER: Your Honor, I wonder if before we bring the jury in –

THE COURT: Yes. I was going to mention something to you. I was confused over the recentness of the case that I mentioned a while ago. I knew that there was one that had just come down, but the case that I had in my mind, the facts on, was the *Prichett* case, which was decided in the Fall, –

MR. STROTHER: That's what I have right here, Your Honor.

THE COURT: And that's the case. I was confused about the one that just came down, as far as that –

MR. STROTHER: If I can have two minutes of the Court's time, I'd like to attempt to distinguish the *Pritchett* case from the situation that we have before us at this time, based on evidence already in this Court – already in evidence.

THE COURT: All right, go ahead.

[2142] MR. STROTHER: As I understand it, the *Pritchett* case goes off, basically, on the proposition that the victim in that case was – The only evidence on which the State was relying in its proof of "heinous", "atrocious", "depravity of mind", was the fact that the victim was shot twice with a shotgun, and that death from the first shot was instantaneous.

Here, there's clear proof that the death of neither of these individuals was instantaneous from the first blow, but was the result of multiple, repeated blows, to wit, the fact that both victims had multiple defensive wounds on their hands. While they're still alive they're repeatedly being hit by the individual inflicting these wounds, –

THE COURT: Yes, I understand.

MR. STROTHER: – evidencing depravity of mind, which I see defined in there as nothing more than depravity of mind. And I think these photographs go to that, and that's all I have to say about it.

THE COURT: I don't think the photographs go to it for the simple reason they don't show the blows to the head, General. That's the point I was trying to make a while ago. Now, insofar as the other point that causes concern is, it's obviously the law and the intent of the Supreme Court of this state, if you prove one clearly supported aggravated circumstance, two clearly supported aggravating – [2141] three – but a jury finds one that they feel is unsupported, that reverses the whole case for sentencing procedure. That's the problem we're dealing with.

But I do not feel that the pictures of the people go to show, or establish, the heinous nature of the crime. They don't show the wounds. And I fail to see their probative value. And I am persuaded that while generally speaking – while generally speaking, we view evidence differently during the guilt or innocence proceedings, as we do in the punishment proceedings, when we're dealing with the death penalty I'm convinced that the Supreme Court of this state is not going to deal with it any differently. Now, that's my philosophy based on – my impression of the rulings that they're making. But I honestly do not feel that these pictures establish what you have described, which I think the jury can rely on in making that determination as to whether or not that aggravating circumstance exists. I'm not saying that you don't have evidence and this jury can't consider that this was heinous or atrocious, and so forth, you see.

MR. STROTHER: I understand.

THE COURT: Okay. But I was confused about the new case as to the facts of it – you know, the one that just came down where they reversed. I had seen it, but also had these other cases out that I'd been reviewing before the [2144] start of the case, and I was confused on the facts.

Okay, bring them in.

(Whereupon, the jury was recalled to open court at 2:15 p.m., and the following proceedings were had in its presence:)

MR. STROTHER: The State rests its punishment phase proof in chief.

MR. DICE: May it please the Court, the Defense rests.

THE COURT: All right, you may argue.

MR. PATTERSON: May it please the Court, and ladies and gentlemen of the jury, I'll be very brief in my remarks to you in this particular case, but in the brevity of my speech to you I would like to call to your attention the proof that you have seen here today concerning, as we had mentioned earlier during voir dire examination, the proof as relates to aggravating circumstances and mitigating circumstances.

The Court, very shortly – and I'm pleased that the charge is not as long as the one was yesterday, but he will charge you again, just as he did yesterday, and you will have the charge with you and the instructions as relates to the particular punishment stage of the trial.

[2145] It's the State's position – and I urge you to consider these things, as being the aggravating circumstances that have been presented to you here today, apply it to the law as His Honor, Judge Beasley, will charge it to you, these things.

That one, that the Defendant was previously convicted of one or more other felonies, other than the present charge, which involved the use of threat of violence to the person. I think the proof was that he used a weapon of violence, I believe he said – I'm not certain he said "pistol", but a weapon of violence in the three convictions in the State of Oklahoma, which I find it a little bit unusual that the convictions in those particular cases occurred on August 9, 1972. The robbery here occurred –

now, bear in mind, that was the convictions of Mr. Cone on that date. If you recall, it was brought out that it was three separate robberies extending from – I believe in November or December of 1979 until some portion, I believe May – I'd say 1969, or '70, but it covers a period of time from November to May of the following year. The years exactly, I do not recall.

Another aggravating circumstance that I ask you to consider that the Court will charge you is, that the murder was especially heinous, atrocious, or cruel, in that it involved torture or depravity of mind.

[2146] I very briefly call your attention to of how Mr. and Mrs. Todd, in this particular case, were beaten about the head – I believe Mrs. Todd was beaten and struck twenty-two times, in which her skull was cracked in; and Mr. Todd, likewise, was beaten sixteen times, having his skull cracked in, and going in and injuring the brain.

In addition to that, it would appear that they were alive for a period of time during the attack due to the fact that the back of the hands were injured, which would indicate that they were aware of what was going on and reacted in an effort to save their lives.

Another aggravating circumstance that I would ask you to consider, and I feel that the proof does bear out in this particular matter, that the murder was committed for the purpose of avoiding a lawful arrest or prosecution, which I feel it's obvious in the fact that he was – he had committed the robbery, initially, of Brodnax, the ensuing chase, the shooting of Officer Allen and the shooting of Doug Clark, and that he had abandoned his automobile and he had no method by which to escape. He entered

the house in question of Mr. and Mrs. Todd, and in the process of effecting his escape in getting to Key West, Florida, killed two old people for no reason, I submit to you, whatsoever. That is the law that we have.

The other one that I submit to you is a aggravating [2147] circumstance that the Court will charge you, is that the Defendant, Gary Bradford Cone, also known as Gerald Mason Harmon, committed the murder during the perpetration of a burglary, which, by definition, is an aggravating circumstance.

There are four that I would call to your attention that, I submit to you, have been proven to you beyond a reasonable doubt and to a moral certainty.

If you will, read the portion of the charge – which it says – if the aggravating circumstances outweigh the mitigating circumstances, the punishment for these two cases is death by electrocution.

I ask you to follow the law of the State of Tennessee, and which you indicated that you would.

I appreciate your service as a juror. Thank you.

THE COURT: Mr. Dice.

MR. DICE: Defense waives final argument, your Honor.

* * *

THE CRIMINAL COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE

Case Nos. 74902, 74898, 74899, 74900, 74702, 74703

[Caption Omitted In Printing]

SENTENCING PHASE – MURDER FIRST DEGREE

Ladies and Gentlemen of the Jury, you have now found the defendant guilty beyond a reasonable doubt of Murder in the First Degree as charged in counts 1 & 2 of indictment numbers B74702 & B74703.

It is now your duty to determine within the limits prescribed by law, the penalty which shall be imposed as punishment for this offense. Section 39-2402, Sub-section (b), Tennessee Code Annotated, provides that a person convicted of Murder in the First Degree shall be punished by death or by imprisonment for life.

In arriving at this determination, you are authorized to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances which may have been raised by the evidence throughout the entire course of this trial, including the guilt finding phase or the sentencing phase or both. The Jury are the sole judges of the facts, and of the law as it applies to the facts in the case. In making up your verdicts, you are to consider the law in connection with the facts; but the Court is the proper source from which you are to get the law. In other words, you are the judges of the law as well as the facts under the direction of the Court.

The burden of proof is upon the State to prove any statutory aggravating circumstance or circumstances beyond a reasonable doubt to a moral certainty.

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily upon the certainty of your verdict. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty is not demanded by the law but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the verdict. The law makes you, the Jury, the sole and exclusive judges of the credibility of the witnesses and the weight to be given to the evidence.

Section 39-2404, Subsection (i), Tennessee Code Annotated, provides that no death penalty shall be imposed by a Jury but upon a unanimous finding of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:

1. The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age or older.

2. The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use of threat or violence to the person.

   Robbery is the felonious and forcible taking from the person of another, goods or money of any value, by violence or putting the person in fear.

3. The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.

4. The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration.

5. The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

   "Heinous" means extremely wicked or shockingly evil.

   "Atrocious" means outrageously wicked and vile.

   "Cruel" means designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless.

6. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.

7. The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, place or discharging of a destructive device or bomb. Burglary is the unlawful breaking and entering a dwelling house [illegible] with intent to commit a felony therein.

8. The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement.

9. The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections employee or firearm, engaged in the performance of his duties.

10. The murder was committed against any present or former, judge, district attorney general or state attorney general, assistant district attorney general, or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupies or occupied said office.

11. The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official.

Section 39-2404, Sub-section (j), Tennessee Code Annotated, provides that in arriving at the punishment, the Jury shall consider as heretofore indicated, any mitigating circumstances which shall include but not be limited to the following:

1. The defendant has no significant history of prior criminal activity;

2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

3. The victim was a participant in the defendant's conduct or consented to the act;

4. The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;

5. The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

6. The defendant acted under extreme duress or under the substantial domination of another person;

7. The youth or advanced age of the defendant at the time of the crime;

8. The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

If you unanimously determine that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the State, beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. The Jury shall state in writing the statutory aggravating circumstances or statutory aggravating circumstances so found, and signify in writing that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found.

You will write your findings and verdict upon the enclosed form attached hereto and made a part of this charge. Your verdict should be as follows:

(1) We, the Jury, unanimously find the following listed statutory aggravating circumstance or circumstances;

(The Jury will then list the statutory aggravating circumstance or circumstances so found beyond a reasonable doubt).

(2) We, the Jury, unanimously find that there are no mitigating circumstances sufficiently substantial

to outweigh the statutory aggravating circumstance or circumstances so listed above.

(3) Therefore, we, the Jury, unanimously find that the punishment shall be death.

The verdict must be unanimous and each Juror must sign their name beneath the verdict.

If you unanimously determine that no statutory aggravating circumstance has been proven by the State beyond a reasonable doubt; or if the Jury unanimously determine that a statutory aggravating circumstance or circumstances have been proved by the State beyond a reasonable doubt; but that said statutory aggravating circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. You will write your verdict upon the enclosed form attached hereto and made a part of this charge.

The verdict should be as follows:

"We, the Jury, unanimously find that the punishment shall be life imprisonment."

The verdict must be unanimous and signed by each Juror.

The Jury in no case, should have any sympathy or prejudice or allow anything but the law and evidence to have any influence upon them in determining their verdict. They should render their verdict with absolute fairness and impartiality as they think truth and justice

dictate. Take the case, consider all the evidence fairly and impartially and report your verdict to the Court.

/s/ James C. Beasley
JUDGE

IN THE CRIMINAL COURT OF TENNESSEE FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

GARY BRADFORD CONE, Petitioner/Appellant,	)	CASE NO. P3653
VS.	)	
STATE OF TENNESSEE, Respondent/Appellee.	)	

PETITION FOR POST-CONVICTION RELIEF HEARING
APRIL 28-29, 1986

* * *

[91] JOHN C. DICE was called, and after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. KOPERNAK:

Q State your name for the record, please.

A John Chapman Dice, D-I-C-E.

Q Mr. Dice, were you retained in the Cone case?

A Yes sir, I was.

Q Were you retained well in advance of trial?

A Yes, sir, I was, by Mrs. Cone.

Q Okay. Did you conduct a thorough investigation into the facts with regard to guilt or innocence?

A I believe I did, yes, sir.

Q Okay. And did you conduct a thorough investigation with respect to preparation for the penalty phase of the trial?

A Absolutely.

Q Okay. Can you tell us the nature and extent of your investigation and preparation for the penalty stage?

A Yes. Mr. Cone was referred to me by the Vietnam [92] Veterans' Center of which Mr. Ed Wallen (phonetic spelling) was the director. Mr. Kopernak, I am the attorney, although I've never mentioned this much to the courts, but I am the attorney who developed the Vietnam Veterans' Stress Syndrome defense across this country along with one other lawyer up in New York. I served as pro bono counsel to the Vietnam Veterans' Center for years. What happened basically is this. When I was contacted by the family of Mrs. Cone, who is a retired Army sergeant's wife, a military wife, had very little money, because of the nature of the type of charge it was, and we were already heavily involved in doing that type of work, I agreed if I could assemble a staff around me; people like Ms. Ferguson who developed Vietnam Veterans' Stress Syndrome as a defense, Katherine M. Witherspoon, who is sitting next to her in this courtroom and is probably the most brilliant research mind I've ever known, and the investigators, et cetera, that we would take the case.

What happened basically is this. The Vietnam Veterans' Center provided doctor Matthew Jeremko as an expert, doctor Jonathan Lipman, who is probably the leading research scientist in the world, in my opinion, in amphetamine psychosis. He came on board for very little money. Mr. Ralph Nalley, of the Public Defender's Office,

voluntarily gave his time, as did Mrs. Lee Abbott (phonetic spelling), to assist us in the defense of this young man's case. With that team [93] assembled, and I was completely responsible – you can delegate authority, in my view point, but I was completely responsible for the strategy that was made and everyone had assigned roles. And I'm proud of my staff.

So, we took on the case at that point. My first interview with Mr. Cone himself was when he returned from Florida. His mother – the Vietnam Veterans' Center provided a social workup, Mr. Wallen went down and interviewed his mother. We've got newspaper articles on the case; I know all about his background in school, his brilliance academically; Mr. Gary Cone graduated from the University of Arkansas cum laude. He was a very gentle child. He had people in his community who were stunned at what had happened, and so we did a thorough social background investigation of him and knew just about everything there was to know about him, including reviewing his military records in depth. I've been in the armed forces myself for twenty-four years, ever since I went to West Point as a seventeen year old boy. I was more familiar than the average lawyer would be with the military aspects of this case, so in preparing the mitigating circumstances or looking at both aspects of the trial, we developed a strategy from the beginning, on the basis of what we had after a very thorough investigation. Mr. Wallen holds an MSW and is recognized throughout the Veterans Administration as someone who does that kind of social background check. So, [94] that's the way we started it.

Q All right. Mr. Dice, was any proof put in the record in the trial at any stage that Mr. Cone was a gentle child?

A No. I think that his mother testified that he changed dramatically when he came back from Vietnam, as did so many people, but in testimony, Mrs. Cone did not do well as a witness and we stayed away, for tactical reasons, from a lot of his family background. I think we got into the record, and I don't recall, that he watched his brother drown when his brother was fifteen years old, I think. But basically, before Vietnam Mr. Cone was a person who had had a normal life, except that he was very brilliant, and after Vietnam, he was a person who was hard on drugs and became involved in a life of crime.

* * *

[96] A * * * I examined every statutory mitigating circumstance that was present. I examined every statutory aggravating circumstance that I felt was present under the facts of these cases. I also examined the case law which says that you can put on more mitigating circumstances in a capital case than are listed by statute. And then knowing that and knowing what we were faced with from the standpoint of proof in this case formulated to trial policy, yes, I did examine them all in depth and the case law that was applicable.

Q Now, was any proof put on with respect to Mr. Cone's [97] background prior to Vietnam?

A Yes, to a certain extent with his mother.

Q Mr. Dice, isn't it fair to say that you tried to put on more of that kind of proof, but it was objected to

because it wasn't relevant to your defense of Vietnam Veterans' Stress Syndrome?

A I don't remember completely from the transcript. I felt that the defense was repeatedly blocked from some of the things we tried to do, yes, Mr. Kopernak. I feel that.

Q How much do you recall Mrs. Cone's testimony?

A She was a mother struggling to protect her son, but she had not had very much contact with Gary since he'd come home from Vietnam, and the changes that had occurred in him were not as well known to her perhaps as if he had lived at home. I did not feel that she did well on the stand. We talked with her several times about her testimony, but Mrs. Cone had had certain ailments and she was under a great deal of pressure, as any mother who loves her son the way she loves Gary, would be in those circumstances.

* * *

[101] A One of the things that Mr. Strother did, and he was an extremely capable prosecutor, as was Mr. Patterson, but they used Mr. Cone's brilliance against him to show that he was a schemer and a planner; in other words, I had some problems with, what am I going to do here? How am I going to approach these mitigating circumstances?

If you'll examine Mr. Cone's D.D. Form 214, which is his discharge from the Army, Mr. Cone was decorated with the Bronze Star, according to his statements to us, after he came home from Vietnam. It is not on his D.D. Form 214. However, that type of thing was not unusual from the standpoint that many of the returning veterans

did not have their decorations listed on their discharges, so one of the things that we did in trial strategy in terms of putting on our mitigating circumstances, I knew, because of pretrial discovery and one phone call to the penitentiary where he'd been, that Mr. Cone's Bronze Star was reflected on his prison records and in his military records. So, I let Mr. Strother run Mr. Blackwell in here on me and I used him to establish that Bronze Star.

* * *

[130] Q Okay. I'm still not clear on this and it's a simple question. Did you discover any authority that encouraged or said it was a good tactic or even a tactic that might be employed at the penalty stage of a capital case, and the tactic I'm referring to is waiver of final argument.

A No, I didn't look for that. I looked for authority under the law, not speculation by authors or people in sterile academia, but by trial lawyers, trial lawyers or law that said from a judge that, Mr. Dice, you cannot waive final argument, and I couldn't find any in the State of Tennessee which said that as a lawyer, you know, that I couldn't do that. It was my tactical decision to make after evaluating all these factors that we talked about, and I did it.

Q While we're on that subject, will you summarize for us all the reasons that you had at that time, and not at this [131] time, but at that time, for waiver of final argument in the penalty phase of the Cone matter?

A Okay. Number one; I thought that we had put on almost every mitigating circumstance that we had. Okay? In the first phase of the trial.

Number two; I managed to sucker Mr. Patterson and Mr. Strother into putting on my Bronze Star decoration without having my defendant testify, which I felt was pretty good trial tactics. I know when I asked Mr. Blackwell that question, one of the two of them over there became unglued. Okay.

Number three; I thought the trial judge had lost control of the case. He allowed Mr. Strother to call me unethical twice in front of the jury, and he did several things in there which had made my client extremely angry. I forgive Mr. Strother for that. I don't think he really believes it, but he's a trial lawyer and he took the position.

Okay. I'm saying the general feeling of that was going – the trial was not being conducted neutrally by the judge. Okay.

The other thing that got to me about the aspects of why to waive, I knew again that they were so much out for blood that they'd screw up their own trial in terms of what the jury was going to find.

Okay. Another factor is that my defendant told me that he would probably explode on the stand with anger if [132] General Strother cross-examined him, and I know Don Strother to be an extremely competent cross-examiner.

Q Just so we'll be clear now. I've asked you to name the reasons for waiving final argument. Was whether or

not what you just said about Mr. Cone possibly exploding, did that have anything to do with waiving final argument?

A Absolutely it did. I didn't make that decision at the last moment at all, Mr. Kopernak. That decision was carefully planned out. When the jury was only out for an hour, when they were only out for an hour, and I think it was close to that, and long before the trial I considered that as a trial tactic. Now, all these factors were being considered, not just one.

Q Okay. Go ahead, please.

A Okay.

Q Do you want me to go over those so you'll – (Interrupted)

A No, because I recall most of them pretty clearly. You know, we'd had all those things go on, and some of the things which had happened in the trial, and when Ural Adams had done that in the Groseclose case and he and I had spent so much time talking about whether or not to do it, I considered that perhaps because of the nature of the opposition in this particular case, that it might be an effective tactic. And I'll tell you this much. Let's say that when we'd gotten [133] down there that Mr. Strother had gotten up and made the first argument, I might not have waived at all if I knew that Patterson was going to make the kill argument. I might not have made it. But once Patterson made the first argument, and then those statements that were reported in the press where Mr. Patterson said, well, we're here because it's wrong to kill people. I'll never forget that one as long as I live.

Okay. When he made that portion in another portion of the trial. So, what I chose to do is to make my closing argument in my opening argument and then suckered them along because they'd already made that mistake, as far as I was concerned. Okay? And see whether or not the jury would take what little mitigating circumstances we had and give us a verdict and keep him alive.

* * *

[192] VALERIE CONE was called, and after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KOPENAK:

Q State your name for the Court, please.

A Valerie Cone.

Q Mrs. Cone, are you related to Gary Bradford Cone?

A I'm his mother.

THE COURT: How do you spell your first name?

THE WITNESS: V-a-l-e-r-i-e.

Q Do you recall back when your son had his trial here in these courts?

A Yes, sir, I do.

Q Do you recall conferring with Mr. Dice about that trial?

A Yes, sir.

Q Did Mr. Dice ever ask you if you wanted to appear as a witness to ask the jury to spare your son's life?

A No.

[193] Q Is that something that you have strong feelings about?

A Yes, sir.

Q And if you were permitted to do that, would you, in fact, want to take the stand and make a plea for your son's life?

A Absolutely.

Q All right. Now, you did testify at that trial.

A I did.

Q All right. And do you remember what you testified to in that trial?

A Yes, and it was mostly connected with just questions as, do you remember certain certain dates, and things like that.

Q Okay. But you never testified as to your son's early childhood and family experiences?

A No, sir.

Q All right. Mrs. Cone, could you tell us who Ella Tullis (phonetic spelling) is?

A That's my sister.

Q All right. Did she know Gary Cone very well?

A Yes, she did.

Q How did she know him?

A Well, she lived fairly close to my mother, and every time we'd come back from leave, you know, my husband was [194] a career man, well, he always got to see her. And then when I was back living there when my husband was overseas, it's only natural, he went to school with her baby daughter, you know, because they was close to the same age.

Q Would you say that she knew him well?

A Yes, indeed.

Q Okay. Are there other persons who are still around who knew Gary well?

A Yes, he has an aunt that knows him well.

Q And what is her name, please?

A Her name is Jimmie Ford now.

Q What's that last name, please?

A Ford.

Q Okay. And where is she staying now? Do you know?

A Yes, she lives in North Little Rock.

Q Okay. And she knew Gary well?

A Uh-huh.

THE COURT: What's the relation?

THE WITNESS: Aunt.

Q Do you know a person by the name of Forrest Clarey?

A I do. He is a – he was a school teacher and he's retired now.

Q All right. Was he one of Gary's school teachers?

A I think – (Interrupted)

[195] MR. PETERSON: Your Honor, if I may. This is all well and good, but we can list hundreds of names here and it has nothing to do with whether or not Mr. Dice and Ms. Ferguson were ineffective, or the constitutionality of his conviction, Mr. Cone's, is void or voidable. This is irrelevant and immaterial.

THE COURT: Mr. Kopernak, what are you trying to show by this?

MR. KOPERNAK: Well, one of the things that concerns me, Your Honor, is we may be required, and I don't think that laws are real clear on this, but we may be required to make a showing that, in fact, other mitigating proof was available, which proof was not put on in the penalty phase of this trial.

I think Your Honor needs to have some idea what proof was available that was not put on that could have been mitigating proof under *Lockett v. Ohio*. That's the purpose of asking these questions, to identify these persons that could have appeared as mitigating witnesses on behalf of Mr. Cone at the penalty phase. It's a matter of showing the Court that there was evidence available that, in fact, was not presented.

THE COURT: Of course, you don't know what these witnesses would have said. Is that right?

MR. KOPERNAK: What I would like to do, since we [196] are at this stage at this point of trying to make a legal determination under all the facts whether or not the constitutional standards have been met in this case, I would request of Your Honor a period of time, and we don't need long, maybe two weeks, in which to prepare short affidavits that would function as proffers of proof as to what these various witnesses could testify to so the Court will have that before Your Honor, if you find it necessary to make a determination with respect to the nature of mitigating evidence that was available.

MR. PETERSON: Your Honor, again, that's all well and good, but he's tied in by the four corners of his petitions, and the State submits that what he's doing is attacking what was not done and not what should have or could have been done. What we're talking about is what Mr. Dice and his team that he described yesterday are accused of not doing, and to come with affidavits or testimonies about all these people he's asking about is irrelevant within the four corners of his document.

MR. KOPERNAK: Judge, if I may respond. Let me get the corners of my document out here.

On page 4 of the amended petition for post-conviction relief, paragraph eleven, subsection A, it is alleged (reading),

> " . . . that at the penalty trial, [197] Defense counsel put on no proof of mitigating circumstances and waived argument, constituting an inadequate strategy as a matter of law."

It may well be that the law is that in any capital case, regardless of what proof was put on in the guilt and innocence stage, that it is outside the range of competence for a lawyer to both fail to put on mitigating proof and waive final argument. We are taking that position, that there's no imaginable circumstance under which that would pass constitutional muster under *Ferman v. Georgia* and its progeny.

As was indicated from the expert witnesses yesterday, most trial lawyers, and I think most authorities –

THE COURT: Well, let's not go into an argument. You've got a witness on the stand.

MR. KOPERNAK: Well, I'm just trying to tell you why it's important to ask these questions.

THE COURT: Well, I've heard your statements. I don't think we need to go any further on that.

MR. KOPERNAK: All right.

THE COURT: What do you want to ask this witness about other relatives?

MR. KOPERNAK: Right, that's what we're doing.

THE COURT: All right.

[198] MR. KOPERNAK: And then I'm going to ask the Court to be allowed to submit affidavits as to – (Interrupted)

THE COURT: As long as you don't go too far in that. I might not be interested in what they have to say at

this particular point because – I may or may not, I don't know.

MR. KOPERNAK: I understand. It's for the record as much as anything, Judge.

THE COURT: All right. Any further questions? The Court will let you ask – you asked about an aunt of Gary Cone's.

MR. KOPERNAK: Virginia Ford, and I just asked about Forrest Clarey.

THE WITNESS: No, the Ford you're talking about is his aunt, you see.

THE COURT: What's her name?

THE WITNESS: Her name is Jimmie Cone.

THE COURT: Jimmie?

THE WITNESS: Jimmi Cone, that's right. She's from North Little Rock.

THE COURT: I thought I heard a Ford.

THE WITNESS: There was a Ford that he was talking about just then, but it's Alvin Ford, which is just a close friend of ours.

THE COURT: And the aunt is Jimmie Cone?

THE WITNESS: That's right absolutely.

[199] THE COURT: And Alvin Ford is a friend?

THE WITNESS: That's right.

THE COURT: All right. You may proceed.

MR. KOPERNAK: Thank you.

Q Mrs. Cone, I believe you indicated that Forrest Clarey was a high school teacher?

A Yes, that's right.

Q Was Forrest Clarey a high school teacher of your son, Gary?

A I'm sure he was, you know, the last year of his schooling, last semester.

THE COURT: These names here – is it Clarey?

THE WITNESS: Clarey, C-l-a-r-e-y.

THE COURT: And Forrest?

THE WITNESS: That's right. F-o-r-d.

THE COURT: Oh, Ford. All right. Okay. High school teacher.

THE WITNESS: He's retired now but he taught my son.

Q All right. How about Robert Parini (phonetic spelling)? Who is Robert Parini?

A Well, he used to live on the street with us. I mean, we was on the same street and he played with Gary when he was a boy.

Q Does he know your son well?

[200] A I think so.

Q Okay. I believe you've already mentioned Alvin Ford. Is that right?

A Absolutely.

THE COURT: How do you spell this Robert?

THE WITNESS: I'm not sure on Parini, but he can give it to you. You know, that's Italian and it don't exactly spell like it sounds.

THE COURT: Excuse me. You may proceed.

Q Are there any other persons you can think of at the present time that knew Gary well when he was growing up or at any time?

A One more.

Q Who is it?

A Larry Douglas.

Q Larry Douglas. Who is Larry Douglas?

A He works in our post office, but he graduated with Gary.

Q Mrs. Cone, how about Linda Drear (phonetic spelling)? Do you know who she is?

A Yes, that's his first cousin, my sister's youngest daughter.

Q Okay. And she knew him well, too, did she?

A Very well.

Q Okay. Did Mr. Dice ever discuss with you about [201] the possibility of calling any of these people as witnesses?

A Well, when he first started on the case he asked quite a few questions about them, but later he discontinued asking.

Q Okay. You were at the trial, weren't you?

A Yes, I was.

Q Okay. Was any proof presented as to what kind of person Gary was?

A No.

MR. KOPERNAK: I don't believe I have any further questions.

MR. PETERSON: No questions.

* * *

FRIDAY, SEPTEMBER 19, 1986

IN THE CRIMINAL COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS
DIVISION VII

GARY BRADFORD CONE, Petitioner, VS. STATE OF TENNESSEE, Respondent.	J. A. BLACKWELL, CLERK BY J. B. [Illegible] NO. P-3653 (Petition for Post-Conviction Relief)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FILED 9-19-86

This matter is before the Court on Petition for Post-Conviction Relief filed by Gary Bradford Cone, through his counsel, James D. Kopernak. The State is represented by Eddie Peterson, Assistant District Attorney. This petition was heard on the 29th day of April, 1986.

The questions presented are as follows:

1. Whether or not there was prosecutorial misconduct on the part of Joseph Patterson and Don Strother, Assistant District Attorneys, which affected the outcome of the trial?

2. Whether or not failure of counsel to object during the State's argument amount to ineffective assistance of counsel?

3. Was there ineffective assistance of counsel at the sentencing phase of the trial?

The Court will now consider the first question presented:

This question arises out of final argument of the prosecutors in the guilt phase, in the murder first degree trial of petitioner. It appears that the day before the murders were committed, petitioner had allegedly robbed a Big Star store and obtained $1,893.72. This robbery indictment was pending at the time of the murder trial. On the day of the murders, petitioner was being pursued by police after robbery of a jewelry store in which no money was obtained. After abandoning the automobile during the chase, petitioner eluded police and forced his way into the home of an elderly couple, the subject of the murders. Meanwhile, police found in the abandoned car a large amount of legend drugs and cash in the amount of $2,459.94.

Petitioner claims that the prosecutor's argument referring to the $2,459.94 found in petitioner's automobile as proceeds from the sale of drugs was improper; that prosecutors knew, or should have known, that more than likely this money came from the robbery of the Big Star the day before.

Petitioner's trial attorney, John Dice, pointed out in his testimony that the reason he did not object to the State's argument concerning the money found in the automobile was that he felt the damage had been done. He did not want to emphasize it further. It is hard to undo what a jury has heard, even with instructions from the Court.

The test for alleged improper prosecutorial misconduct is "whether the improper conduct could have affected the verdict to prejudice the defendant". *Judge v. State*, 532 S.W. 2d 340 (Tenn. Crim. App. 1976). Therefore, if the prosecutor's conduct and argument to the jury was improper, the question to be answered is, "Did that conduct affect the jury's verdict to the defendant's prejudice?". I think not.

In *Judge v. State, supra,* the Court pronounced five factors to be considered in determining whether the prosecutor's conduct was improper to such a degree as to warrant reversible error.

(1) The conduct complained of viewed in context and in light of the facts and circumstances of the case;

(2) Curative measures undertaken by the Court and the prosecution;

(3) The intent of the prosecutor in making the improper statement;

(4) The cumulative effect of the improper conduct and any other errors in the record;

(5) The relative strength or weakness of the case.

In considering point one, above, this Court takes into consideration the aggravated and horrible nature of these crimes; the fact that there was a large amount of drugs found in the trunk of petitioner's automobile and the abundant evidence in the case as to the murders. This Court is of the opinion and finds that the argument of the prosecutors concerning money coming from a drug sale more likely than from a pending robbery case did not

affect the outcome of the trial. Had no money been mentioned, the Court is of the opinion the verdict would have been the same, based on the facts and circumstances.

Regarding the second point raised in the *Judge* case, *supra*, this Court notes that although no curative instructions were given because of the lack of any objection, and considering the reasons given by trial counsel that he did not want to emphasize it any further since the jury had already heard it, this Court recognizes this as a viable tactic that counsel may use and does not find that Mr. Dice's use of this tactic rendered his assistance ineffective as a matter of law.

Upon consideration of the third point, Mr. Strother, the prosecutor, testified that he knew there was a pending robbery charge, but he did not concern himself with it because they were trying the murder case first. This Court finds that prosecutors knew, or should have known, that a large amount of money was allegedly taken by this defendant the day before the murders. This should not have been argued.

This Court cannot say from the evidence that prosecutors consciously argued it with this in mind. Although it appears that the $2,459.94 found in the automobile was more likely part of the $1,893.74, which was allegedly taken in the robbery the day before, there is no evidence to show it was actually a part of the robbery money. This Court cannot say, therefore, that prosecutors' argument was malicious or with wilful improper intent.

As to points four and five, this Court does not find any cumulative effect of improper conduct throughout

the record which would require a new trial in view of the strong and compelling evidence in the murder case.

This Court is of the opinion that prosecutor's conduct in this case "did not so infest the trial with unfairness as to make the resulting conviction a violation of the Fourteenth Amendment's Due Process clause". *See Darden v. Wainwright,* 106 S.Ct. 2464, June 23, 1986.

Let us turn to petitioner's allegation that he was denied effective assistance of counsel at the sentencing phase of the trial. Petitioner sets forth several claims:

1. Failure to interview critical prosecution witness Eileen Blankman;
2. Failure to adequately advise the defendant of the probable effect of his not testifying at the penalty stage;
3. Failure to adequately investigate and adequately prepare pre-trial as to mitigating factors and circumstances;
4. The defense counsel's failure at the penalty stage to put on proof of mitigating circumstances and also his waiver of argument at that stage.

These claims of ineffective assistance of counsel are considered in light of the defense offered by trial counsel. This defense, called "Vietnam Veterans' Stress Syndrome" was novel in its approach and supported by an expert witness. These claims should further be assessed in light of the testimony of several attorneys in this hearing that Mr. Dice is one of the most thorough and conscientious criminal defense attorneys in Shelby County. Although they did not agree with some of the strategies used, they

nevertheless had no doubt of his abilities and competence.

In consideration of the first allegation concerning failure to interview critical prosecution witness Eileen Blankman, the Court notes.

Mr. Dice's testimony that he did not interview Eileen Blankman; that he knew she was a prosecution witness; that he discussed it with his client prior to trial and his client strongly insisted that he wanted to "keep her out of it"; in view of the overall preparation of the defense in this case, the Court does not reach the conclusion that failure to interview this witness rendered ineffective assistance of counsel.

Looking at the second allegation, this Court finds that Mr. Dice did discuss with his client whether he should take the stand. Mr. Dice pointed out that things had gotten heated between him and prosecutors; that his client was very upset and admitted to his attorney that he would explode if he took the stand. Dice testified that he left the final decision to his client.

After considering the facts presented, this Court is of the opinion and finds that Mr. Dice did adequately discuss and advise his client as to the probable effects of his testifying at the penalty stage.

Turning now to allegations three and four, claiming failure to adequately investigate and prepare, pre-trial, as to mitigating factors, and also the failure of counsel to put on proof of mitigation in the penalty stage, including his waiver of argument at that stage. This Court finds from the facts and circumstances that Mr. Dice put a great

deal of thought and preparation in this case; further, he pointed out he interviewed numerous family members and relatives whose testimony was contradictory and generally not helpful. He said his strategy was to get as much mitigation in during the guilt/innocence phase as he could. It is the opinion of this Court that the defense attorney's performance, including his decision not to introduce any evidence in mitigation, did not fall below the objective standard of reasonableness set by the Sixth Amendment's guarantee of the effective assistance of counsel. *Darden v. Wainwright, supra. See, also, Strickland v. Washington,* 466 U.S. 668.

In reference to the waiver of final argument in the penalty phase, it was clear from testimony from the record that this was strategy on the part of defense counsel, in view of the prosecutor's (Mr. Strother) reputation for devastating closing arguments. Even the attorney testifying here at the bar confirmed the extremely effective and strong argument of Mr. Strother.

As the Supreme Court said in the *Wainwright* case, *supra,* " . . . a defendant must overcome the presumption that, under the circumstances, the challenged action of counsel might be considered sound trial strategy".

Upon consideration of all the proof presented, this Court finds as a matter of fact and concludes as a matter of law, that petitioner's counsel, John Dice and April Ferguson, did render effective assistance of counsel in all respects as required by *Baxter v. Ross,* 523 S.W.2d 930 (Tenn. 1975). Accordingly, the Petition for Post-Conviction Relief is hereby denied.

IT IS SO ORDERED, this 19th day of September, 1986.

/s/ Arthur T. Bennett
ARTHUR T. BENNETT,
Judge, Division VII

Whereupon Court adjourned until Monday morning at 9:30 o'clock.

/s/ ARTHUR T. BENNETT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

GARY BRADFORD CONE,

Petitioner,

v. No. 97-2312-MI

RICKY BELL, Warden, (Filed June 1, 1997)

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

EXHIBIT 4

(Excerpts)

BEST AVAILABLE COPY

OVIDENT
E AND ACCIDENT
ISURANCE COMPANY
TANOOGA, TN 37402

INSURED'S STATEMENT OF CLAIM

Claim No. _____

LIST ALL POLICY NUMBERS FOR WHICH CLAIM IS MADE
1) _____
2) _____
3) _____
4) _____
5) _____

ame JOHN C. DICE Home Phone No. (901) 323-5710

ome Address 2384 ST. ELMO, MEMPHIS, TN
(Street No.) (City) (State/Province) (Zip Code)

ate of birth 11/12/43 Social Security No. 411-68-2171

lame of Employer DICE, BURSON & HOLDER

Address of Employer Suite 200, 240 POPLAR AVE, MEMPHIS TN 381
(Street No.) (City) (State/Province) (Zip Code)

Business Phone No (901) 521-8190 Job Title when disability began ATTORNEY/PARTNER

Description of job duties and responsibilities Full Partner in Dice, Burson & Holder

How long have you been employed in your present occupation? 12 years

Does Employer pay any part of premium for the policy (policies) for which claim is being made? Yes ✓ No ____ If yes, what per
____%. If Claim is made under two or more policies, indicate "yes" or "no" and percent for each. 1) ____ % 2) ____
3) ____ % 4) ____ % 5) ____ %. Employer's Federal tax identification no. ____

R CIDENT AIMS

Date of accident? April 19 86 How and where did it happen? Struck in the face with an opponent's racquet while playing racquetball

What injuries resulted from accident? Concussion, laceration under left eye.

R CKNESS AIMS

Date sickness began? Feb 19 86 Nature and details of sickness Psychological problems, abdominal pains, blurred vision, headaches, slurred speech

Date you last worked? 2-4 19 86 Date of first medical attention for the disabling condition? 4-13 19 86
Last treated 8-18

List dates, names and addresses of all physicians consulted:

Date	Name	Address
4-13-86	St. Francis Emergency Room	Park Ave., Memphis TN
5-18-86	office of Louis E. Tyler, M.D.	4339 Elvis Presley Blvd, Memphis TN
8-7-86	John Hutson, M.D.	Two Steele, Memphis TN

OR ...on
LL LAIMS

If hospitalized, dates admitted and discharged 9-5-86 thru 9-11-86

Hospital name(s) and address(es) Baptist Central Unit, Memphis TN

Dates of total disability (working in any occupation) From ____ 19 ____ through ____ 19 ____

First date returned to work or place of business Still not returned to work

Dates of partial disability: From ____ 19 ____ through ____ 19 ____

If you have not yet returned to work, do you expect you will be able to? Unknown 19 ____ Will a sui
to fall on that basis be satisfactory?

Have you ever had claims or benefits ... Yes ____ No ✓ If yes, list dates, names and addresses of physicians and hosp

Date Name Address

ee Attached Sheet

HUTSON'S FILE 8

87

BEST AVAILABLE COPY

Clinical Psychologist's

ATTENDING PHYSICIAN'S STATEMENT FOR DISABILITY CLAIM

Name of Patient John C. Dice Date of birth 12 Nov 43

Diagnosis and concurrent conditions 296.62 Bipolar Disorder - Depressed (as of Sept 96)

When did symptoms first appear or accident happen? October 1995 - initial hospitalization
February 1996 - current deterioration

When did patient first consult you for this condition? 31 October 1995

Has patient ever had same or similar condition? Yes ____ No ____ I am not certain

If yes, state when and describe the patient was reported as having some previous episodes of major depression but they were apparently not as incapacitating as her last episode

Name and address of ~~referring physician~~ or other treating physician Randall D. Markowitz M.D.
1326 Eastmoreland Avenue Memphis

Nature of treatment (including surgery and medication prescribed, if any) Outpatient psychotherapy (in-patient psychotherapy was anti-depressant medication was prescribed but refused by the patient. The patient obtained a number of medical consultations on his own.

Dates of treatment: Hospital 5-12 September 1996
(Name of Hospital Methodist Central Hospital - Memphis)
Office 31 Oct, 7, 14 Nov 95. 10, 23 Feb; 4 Sept, 2 Oct 96.

What are the patient's present limitations? Complains of thinking impaired memory, inability to concentrate

In your opinion, is the patient now ~~necessarily~~ totally disabled? Yes ____ No ____ If yes, when did total disability begin? I told the patient on 7 Feb 96 that I did not consider him competent to make decisions and his participation in [illegible] My opinion is that he does regain his ability.

When can patient resume part time work? ____

When can patient resume full time work? ____

Is patient still under your care for this condition: Yes ____ No X

Name and address of any other insurance company to which this loss has been reported:

Name	Address

Remarks:
The patient allegedly died by his own hand between 6 and 8 October 1996

Dear Doctor: Your opinion on the degree of disability is essential; therefore we ask that you, as the attending physician, personally sign this report.

John R. Watson — Print name
Ph.D. Clinical Psychologist — Degree
[signature] — Signature

Date 22 October 1996 Phone No. 901 388 1973

Street Address 1 S120 Idlewood Road City or Town Memphis

State or Province Tennessee Zip Code 38134

HUTSON'S FILE 11

John Dice

02/10/86 Very tangential, some pressure of speech, grandiosity, peresecutory ideas, not sleeping, some religiosity, "crusading against windmills". Paranoia (actually seen on evening of 9th).

/s/ John R. Hutson

02/22/86 Some improvement, slightly more settled, but still not very functional – 40%-45%.

/s/ John R. Hutson

09/04/86 Some insight. Appears to be coming out of psychosis/depression etc. Financial and Professional trouble. rec: hospitalization at Methodist Central for medical evaluation & because of concern over dysfunctioning.

/s/ John R. Hutson

10/02/86 Depressed, concerned over impotence, described head injury in April, suicidal contract made as he admits thoughts but denies plans and his religious issues with ~~ideas~~ Neurological to be set up with ~~Batinini~~ Bartonini (neurological).

/s/ John R. Hutson

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

GARY BRADFORD CONE Petitioner	)	
v.	)	No. 97-2312-M1 Judge McCalla
RICKY BELL, Warden, Respondent	)	(Filed Dec. 9, 1998)

MOTION TO EXPAND THE RECORD/
ALTERNATIVELY
MOTION TO ALLOW PARTIAL OFFER OF PROOF

EXHIBIT 6

WEST END PSYCHOTHERAPEUTICS CENTER
SUITE 607, PARKVIEW TOWERS
210 25th AVENUE NORTH
NASHVILLE, TENNESSEE 37203
Telephone (615) 327-3620

Clinical Psychology GILLIAN BLAIR, Ph.D.

PSYCHOLOGICAL EVALUATION
Confidential

NAME:	Gary Bradford Cone
DATE OF BIRTH:	10/11/48
AGE:	42 years
EDUCATION:	B.S.
DATES EVALUATED:	10/17; 10/24; 10/31 and 11/7/90
REFERRAL:	Dennis Balske, Attorney.

SUMMARY

This 42-year-old caucasian male, who is under sentence of death in the State of Tennessee, currently functions within the range of superior intellect. This is generally consistent with an evaluation conducted in 1981. However, this represented some deterioration from his premorbid level, which apparently was within the very superior range. Discrepancies were apparent between various cognitive domains. Psychomotor retardation was in evidence and in part accounted for lowered scores on certain timed tests. This slow tempo, and general level of inefficiency was also apparent on tests of personality. Resentfulness, social alienation and cognitive disorganization at times of stress were observed characteristics. Test data, observation and social history cumulatively presented a picture consistent with the following diagnoses:

Post-traumatic stress disorder, superimposed on early onset
Dysthymia
Polysubstance dependence, in remission
Personality disorder not otherwise specified (avoidant, schizoid, dependent).

REFERRAL

Gary Cone was referred for psychological evaluation by his attorney, Dennis Balske. Mr. Cone is under sentence of death for a crime committed in August 1980. Psychological and psychiatric assessments at the time of arrest and trial were inconclusive. For example, one such evaluation indicated the presence of significant disturbance, perhaps schizoaffective in nature. Yet another found no evidence to support the presence of any mental disturbance. Expert

witness testimony at trial raised the possibility of a drug induced psychosis, or opiate withdrawal symptoms to account for apparent behavior. In addition, the possibility of a post-traumatic stress disorder secondary to experiences in Vietnam was also raised. Evaluation at this time was sought to help clarify some of the above issues.

SOURCES OF INFORMATION

Wecshler [sic] Adult Intelligence Scale – Revised (WAIS-R)
Booklet Category Test (BCT)
Wisconsin Card Sorting Test (WCST)
Trailmaking Test, Parts A & B
Wechsler Memory Scale – Revised (WMS-R)
Beck Depression Inventory (BDI)
Incomplete Sentences Blank (ISB)
Minnesota Multiphasic Personality Inventory – 2 (MMPI-2)
Millon Clinical Multiaxial Inventory – II (MCMI-II)
Rorschach
Clinical interview
Review of available records.

SOCIAL HISTORY

A full social history will not be reported here, since it is readily available elsewhere.

Briefly, Gary Cone was the youngest of four children born to Valerie and Zack Cone. Zack was a career NCO in the military, and by virtue of this, the family moved around extensively. Mr. Cone Senior died of a myocardial infarct in November 1972. Mrs. Cone is living, but has had a stroke, and suffers from hypertension. Of the four children, only two are still living, Gary and his older sister Rita. The older child, Zack Leonard, died at age 15 of a

heart attack, following exposure to icy-cold lake water. Zack had residual heart problems secondary to rheumatic fever. Gary was 8 or 9 at the time of his brother's death, and remembers seeing Zack's body being hauled from the lake. It was reported by family members that Gary was greatly disturbed by his brother's death. An older sister, Sue, who was about five years older than Gary, died in February 1990 of breast cancer. Gary was extremely close to both of these siblings. Rita, is legally blind, a residual of measles at age four. None of the Cone children ever married.

Gary's early development was apparently unremarkable. His mother described him as a "perfect" child. There was absolutely no suggestion of any behavioral disturbance, even in adolescence. Gary was described as a quiet, studious child. However, his relationship with his father was cool, presumably because of Gary's reluctance to participate in typically masculine pursuits, such as deer hunting.

Physical health was apparently within normal limits. Gary entered school at age five, turning six soon after. Grades were always good. Gary spent his senior year in high school living with his grandmother. It was not clear if this was necessitated by a family move, or the result of conflict between Gary and his father. Following graduation, Gary enlisted and served in the US military 1966 to 1969. He was posted to Germany, and from there volunteered for Vietnam. A dramatic difference in Gary was noted by family members on his return. He was described as edgy, hyperactive, and emotionally estranged. Gary attended the University of Arkansas 1969 to 1972, and achieved a B.S. in business and finance. During this time

Gary's associates were mainly Vietnam veterans. While a student he met, and became engaged to, a young woman Glenda, who graduated ahead of Gary and moved to Tulsa to work. On his graduation Gary took a trip alone to Europe. On his return he turned himself into authorities in Oklahoma and received a 25-year sentence for armed robbery. A few months later, October 1972, an attempted escape brought another three years, with one year on punishment status. In November, 1972, Gary's father suddenly died. In December of that year, Glenda was raped and murdered as she left work.

Drug abuse that began in Vietnam, escalated in prison. On Gary's release in 1979, he was drug dependent. Nonetheless, he did well on the LSAT examination, and was accepted into law school for August/September 1980. Mr. Cone has been incarcerated since his arrest in Florida, in August 1980.

Review of available records revealed that Mr. Cone functioned in the very superior range intellectually (IQ reported to be 144) at the time of his parole in 1979. Psychological evaluation in February 1981 revealed significant deterioration, with intellectual functioning falling only in the high average range (Verbal IQ 125; Performance IQ 111; Full Scale IQ 120). The psychologist (Dr. Ryan) attributed this decline to the intrusion of aggressive impulse derivatives, rather than organicity. He described thought processes as concrete with some perceptual distortion. He further elaborated that Mr. Cone had difficulty "switching thoughts", and that he tended to focus specific elements of a situation to the exclusion of others. Dr. Ryan described this as predominant or pressured thoughts. The above coupled with personality

test data led Dr. Ryan to a diagnostic impression of a schizo-affective disorder combined with the chemical dependency.

BEHAVIORAL OBSERVATIONS

Gary Cone presented as a short, extremely neatly groomed 42-year-old caucasian male of average build. Dress was institutional, grooming was excellent, hair and beard were greying, and glasses were worn. Mr. Cone was reserved, softly spoken, cooperative and adequately interactive in terms of the assessment process. He was emotionally distant, and socially alienated. Affect was superficially bright, but appeared blunted at core. There was some suggestion of suspiciousness, but not to the extent of paranoia. Gary Cone can best be described as remote. Indeed, the description of Mr. Cone made in 1981 as de-personalized, with an automatic and bland style of delivery remains relevant. The almost autistic logic described then was again similarly in evidence.

Speech was soft, but articulate, coherent and relevant. Conversations were spontaneous and well organized in terms of abstract ideas. For example, he is a voracious reader, and was willing to discuss literature and ideas extensively. He was considerably less forthcoming in volunteering information about emotional issues. Generally, Gary was evasive with evidence of disorganization and fragmentation of thought in relation to social relationships. There was no evidence of florid psychosis; both auditory and visual hallucinations were denied. Suicidal and homicidal ideations were similarly denied. There was no evidence of a delusional system. Insight was abysmal,

judgement was generally poor, particularly in the realm of social situations.

Gary's description of his social history was essentially as reported briefly above, and available in the extensive records reviewed.

Gary described his childhood as typical of other military families. He said that his father was a rigid authoritarian. He felt that he was not exactly physically abusive, but was intimidating and emotionally abusive. Gary recalled his brother's death and his witness of the removal of the body from the lake. He could not remember much of how he felt afterwards. He described himself as "fading out". Gary reported that he enjoyed school. He did not describe a typical adolescence of the early 1960's.

Despite Gary's obvious difficulties with his father's authoritarian attitudes, he chose to enlist on graduation from high school. His rationale now for that behavior was that he hoped to utilize the GI education bill. Although not a combat soldier in Vietnam, Gary described disturbing and traumatic experiences while there. For example, the stench from the corpses, and the way in which they were stored in refrigerators alongside food; witnessing death; being required, even on occasion to fire a weapon; the long hours of guard duty; and the escalating drug abuse, often ostensibly sanctioned by superior officers. On his return to the United States Gary described feeling alienated from his peers, but curiously closer to his father, although there was no obvious improvement in their relationship.

As previously mentioned Gary enrolled at the University of Arkansas, where he completed his degree in 3 years,

making excellent grades. He said that being in school was "easy". During the years he was in school (1969 to 1972), most of his friends were Vietnam veterans. However, he met and became engaged to a young woman called Glenda. She was ahead of him in school, and was very active in one of the sororities. Gary said that, other than his family, she was the only person he loved. HIs description of that relationship indicated an idealized fantasy, rather than a deep emotional commitment to another. For example, Gary maintained a life-style throughout his college years that she was not privy to. Furthermore, on graduation he took a trip to Europe without her. While in Switzerland, he had a car accident and broke his leg. On his return to the U.S., he learned that a warrant was out for his arrest for armed robbery. Gary said he turned himself in to the Oklahoma authorities in August 1972 on the assumption that he would get a lesser sentence. He said that he was devastated by the 25-year sentence. In October 1972 and [sic] abortive escape led to an additional three years, with one year on punishment status. The following month Gary's father died unexpectedly. In December, 1972 Glenda was raped and murdered as she left work. Gary, of course, did not attend her funeral. However, on his release from prison he visited her grave, and said that he felt numb. During incarceration 1972 to 1979, Gary witnessed severe riots; received a head injury requiring 10 stitches; and became drug dependent. Drug of choice was dilaudid, but use was indiscriminate. Gary stated that he always believed that his drug use was under control, and that he intended to stop using once he entered law school.

Testing conditions were good. Mr. Cone was fully cooperative with the assessment process, and rapport was readily established. The following results are, therefore, felt to be an accurate representation of his current level of functioning.

TEST RESULTS

Mr. Cone was found to be functioning within the superior range of intellectual abilities (Verbal IQ 131; Performance IQ 116; Full Scale IQ 129). The observed Verbal > Performance difference of 15 points, was similarly noted in 1981. Intratest scatter had also remained stable. The range of observed scaled scores in both 1981 and today was 7 to 18. Current test results demonstrated verbal intelligence within the very superior range. However, within the performance domain, Gary's abilities only fell within the high average range. Psychomotor retardation was clearly an important factor. Scaled scores on the WAIS-R have a mean of 10, with a standard deviation of 3. Thus, scaled scores of 8 to 12 fall within the average range. The individual subtest scaled scores obtained by Mr. Cone are shown in the attached data sheet. On six of the eleven subtests, performance was >91st percentile compared to same age peers. However, performance on the Digit Span and Digit Symbol subtests was at the 16th and 25th percentile respectively. Mr. Cone's abstract reasoning skills and his docility with arithmetic problems attracted perfect scores. Lowered performance on Digit Span can be a function of reduced attention. However it has also been associated with left hemisphere vulnerability. Difficulties with the Digit Symbol task generally reflects

psychomotor slowing, but problems with focus may also impact performance.

The difficulties noted on certain WAIS-R subtests, was similarly evident in Mr. Cone's performance on the Trail-making tests. Time to complete each part of the test was slow compared to overall intelligence. His performance, although error-free, placed him at the 50th percentile.

Higher cognitive functions appeared intact. Absolutely no difficulties were observed with either the Category Test, or the Wisconsin Card Sorting Test.

Tests of memory functions revealed significant differences between verbal and visual memories. Despite Mr. Cone's superior verbal intellect, his memory for verbal material was below average. In particular, he had considerable difficulty remembering meaningful verbal material, where the content was typically about some sort of social interaction. However, his memory for lists of words with no social meaning was excellent. Problems were evidence with immediate memory, and did not deteriorate further with a 30 minute delay. The already observed difficulty recalling strings of numbers (WAIS-R), was also evident on the WMS-R.

The unusual, but stable, pattern observed in Mr. Cone appears to reflect psychopathology, rather than organicity. This was the general conclusion in 1981, and current test data, both cognitive and personality, appeared to support this.

Current data from personality tests was consistent across all instruments administered. Situational depression was evident on both the BDI and the ISB.

Valid profiles were obtained from both objective tests of personality functioning (MMPI-2 and MCMI-II). The F scale elevation on the MMPI-2 (T=70) indicated the presence of deviant social convictions, along with considerable social alienation (0 scale, T=78). The 1-4 clinical profile is associated with severe somatic complaints, often headaches, along with a degree of rebellion. These individuals typically lack direction, have low energy, poor social skills are plagued by indecision. The concomitant low 9 scale (T=49) further supports the low drive, reduced levels of activity, social withdrawal, and inability to express feelings directly. The MCMI-II data revealed Mr. Cone's avoidant tendencies, and his introversive, edgy and dependent character. Mr. Cone lacks social initiative, and his social interactions will generally be affectless and grim. Mr. Cone has little in the way of spontaneity in his personality profile. He lacks the will to operate in a socially competent fashion, he is typically passive and solitary, indifferent to his social milieu. This social isolation in some part is attributable to his inability to experience pleasure. However, beneath this apathy he harbors feelings of discontent and anger, that are typically displayed in a passive-aggressive fashion. His preference appears to be for a simple, repetitive and dependent lifestyle, where responsibility for his actions can be abdicated.

A valid Rorschach profile was also obtained. This essentially confirmed the above. Specifically, Mr. Cone is emotionally distanced. However, at times of intense emotional stress, Mr. Cone may show evidence of cognitive disarray. He demonstrated significant emotional irritation secondary to strong unmet needs for closeness and

dependency. Mr. Cone clearly has no need to be concerned with appearing conventional. His perceptions are unique, and somewhat over-personalized. However, he is able to appreciate the commonplace when required to do so. Perfectionist traits were evident. Generally, Mr. Cone will only devote his energies to projects [sic] have some probability of success.

DISCUSSION

The similarity between current test data and that obtained a decade ago was interesting. In 1981 it was concluded that data was reflective of the "intrusion of aggressive impulse derivatives". There was no clear evidence to support organic involvement. There was similarly no evidence to support the presence of florid psychosis. However, social history and limited earlier psychological data suggested no premorbid impulse control difficulties. For example, Mr. Cone was described as a perfect child. Thus, any aggressive impulses might be assumed to be the product of some intervening variable. Possible candidates appears to be: drug dependence; head trauma; or a psychiatric disturbance.

At this time active drug dependence is a non-issue. Mr. Cone claims no current use. Little evidence exists to support organic involvement secondary to head injury. However, there is considerable evidence to support the presence of a psychiatric disturbance. The social history is replete with events likely to produce symptoms consistent with a diagnosis of post-traumatic stress disorder (PTSD).

PTSD is an anxiety disorder that occurs in response to events that are typically viewed as being outside the realm of normal human experience. Mr. Cone has experienced several such events. The major traumas in his life have been:

1. At age 8 or 9, witnessing his brother's body being removed from the lake. Gary's problems following this event are well documented historically.

2. His grandmother's death, just after high school graduation. Gary lived with her, and clearly viewed her as a safe haven from his father.

3. Duty in Vietnam, 1968-1969. although not a combat soldier, experiences were beyond the realm of normal experiences for a 20-year-old.

4. Rape and murder of his fiancé in December 1972.

The extensive literature on trauma, and its aftermath has shown that the effects can be both direct and indirect. basically, the effects on Mr. Cone appear to have been indirect. One such indirect effect is avoidance and numbing. In these individuals, there is a reduced capacity to experience emotion, notably in the realms of intimacy, tenderness, grief and the appropriate expression of sexuality. They become emotionally detached, and the ability to experience pleasure is diminished. Mr. Cone fits this cluster of behaviors. Current literature tends to focus on two types of trauma victims, and Mr. Cone has a foot in each camp. The bulk of the literature reflects the effects of trauma on Vietnam veterans. A second body of literature is concerned with the long term effects of childhood trauma. Mr. Cone experienced both, plus the experience of the rape and murder of his fiance.

Several authors (Wilson & Zigelbaum, 1982; Blank, 1985; Eth & Pynoos, 1985; Johnson, 1989) have described how victims of PTSD have altered personalities that *may* lead to antisocial behavior. PTSD victims often operate in a "survivor mode", they come sensation seekers who flirt with danger. All authors have written of the elements necessary to link antisocial/criminal behavior with PTSD. For example it is assumed that:

1. the behavior be unpremeditated
2. the behavior is uncharacteristic
3. there are more than one traumatic events that are re-enacted
4. there is amnesia for the episode
5. the behavior lacks motive
6. the trigger for the behavior represents something reminiscent of the trauma
7. the individual is unaware that the behavior represents re-enactment
8. the victim(s) is random or accidental
9. the individual has symptoms consistent with PTSD.

Mr. Cone meets all of the above, except that the trigger for his behavior is unknown. In addition, Mr. Cone has the hallmarks of delayed response to trauma, that is the psychic numbing, the social alienation, the interpersonal conflict, drug abuse and global problems with intimate relationships. Displaced anger is often associated with individuals who were traumatized as children.

Childhood trauma is associated with aberrant personality development, further exposure to traumatic events would exacerbate any existing problems.

Overall, the data support the following diagnoses:

> An atypical Post-traumatic stress disorder; Dysthymia, early onset; Polysubstance Dependence; Personality Disorder NOS (avoidant, dependent and schizoid).

/s/ Gillian Blair
Gillian Blair, Ph.D.
Clinical Psychologist.

PSYCHOLOGICAL EVALUATION

DATA SHEET

NAME:	Gary Bradford Cone
DATE OF BIRTH:	10/11/48
AGE:	42
HANDEDNESS:	Left

WAIS-R VERBAL TESTS	SCALED SCORE
INFORMATION	16
DIGIT SPAN	7
VOCABULARY	16
ARITHMETIC	17
COMPREHENSION	14
SIMILARITIES	18

PERFORMANCE TESTS	SCALED SCORE
PICTURE COMPLETION	12
PICTURE ARRANGEMENT	13
BLOCK DESIGN	14
OBJECT ASSEMBLY	10
DIGIT SYMBOL	8

VERBAL IQ	131
PERFORMANCE IQ	116
FULL SCALE IQ	129

TRAILMAKING TEST	TIME	ERRORS
PART A	36"	0
PART B	61"	0

WMS-R	INDICES
VERBAL MEMORY	96
VISUAL MEMORY	126
GENERAL MEMORY	102
ATTENTION/CONCENTRATION	105
DELAYED RECALL	114

WCST	
CORRECT	
ERRORS	4
PERSEVERATIVE RESPONSES	3
NON-PERSEVERATIVE ERRORS	4

PERSEVERATIVE ERRORS	0
CATEGORIES	6

BCT

ERRORS	7

MMPI 2

SCALE	T-SCORE
L	52
F	70
R	62
1	68
2	59
3	61
4	72
5	52
6	57
7	49
8	62
9	49
0	51

MCMI-II

PERSONALITY CODE:	Schizoid/Antisocial
CLINICAL SYNDROME:	Drug Dependence

Supreme Court, U.S.
FILED
JAN 29 2002
CLERK

(3)

No. 01-400

In The

Supreme Court of the United States

RICKY BELL, WARDEN,

Petitioner,

v.

GARY BRADFORD CONE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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59 pp

CAPITAL CASE
QUESTIONS PRESENTED

I.

Did the court of appeals exceed its authority under 28 U.S.C. §2254(d)(1), as interpreted by this Court in *Williams v. Taylor*, 529 U.S. 362 (2000), by granting habeas relief to respondent on his claim of ineffective assistance of counsel at the sentencing phase of his capital trial, where that claim had been previously adjudicated and rejected on the merits in Tennessee state court proceedings?

II.

May a court of appeals bypass the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), and presume prejudice under *United States v. Cronic*, 466 U.S. 648 (1984), to find a violation of the Sixth Amendment right to counsel, where defense counsel conducts a thorough pre-trial investigation, presents lay and expert witness testimony in support of a mental health defense at trial, conducts direct and cross-examination, and addresses the jury at both the guilt and sentencing phases on behalf of his client, and where state and district courts have previously determined that the defendant failed to demonstrate actual prejudice from any deficiencies identified in the attorney's performance?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1) is reported at 243 F.3d 961. The memorandum opinion of the United States District Court for the Western District of Tennessee relevant to respondent's ineffective assistance of counsel claim (Pet. App. 39) is unreported.

JURISDICTION

The judgment and opinion of the court of appeals were entered on March 22, 2001. (Pet. App. 1-38) A petition for rehearing was denied on June 1, 2001. (Pet. App. 112) The petition for a writ of certiorari was filed on August 30, 2001, and granted on December 10, 2001. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. §2254(d) provides in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

STATEMENT OF THE CASE

In 1982, Gary Bradford Cone was convicted of two counts of first degree murder by a Shelby County, Tennessee, jury. Following a separate sentencing hearing, the jury sentenced Cone to death for each of the two murders. Cone's convictions and sentences were affirmed on direct appeal (Pet. App. 84), and later upheld in state post-conviction proceedings. (Pet. App. 101) Cone then sought a writ of habeas corpus in federal district court. The district court summarily denied relief, concluding that Cone failed to demonstrate prejudice from counsel's alleged deficiencies and, further, that he failed to demonstrate that the state court's adjudication of his ineffective assistance claim "involved an unreasonable application of clearly established Federal law" under §2254(d)(1). (Pet. App. 77-83)

On appeal, nineteen years after Cone's criminal trial and sentencing, the court of appeals reversed his death sentences, finding that defense counsel's decision to present no mitigation evidence at the sentencing phase and to waive closing argument at sentencing not only amounted to constitutionally deficient performance, but was so deficient as to raise a presumption of prejudice, resulting in a violation of Cone's Sixth Amendment right to counsel. (Pet. App. 37) The court of appeals based its decision on the same testimony presented to the State courts and upon which those courts relied in rejecting the same claims in state post-conviction proceedings. (Pet. App. 34)

1. The brutal murders of Shipley and Cleopatra Todd were the climax of a series of criminal episodes that

began on August 9, 1980, when Cone robbed a jewelry store in Memphis of approximately $112,000 in merchandise. (Pet. App. 85) The jewelry store manager gave a description of the suspect to police, and an officer in an unmarked police car spotted Cone driving his vehicle a short time after the robbery and pulled in behind him. (*Id.*) Cone apparently became alarmed and accelerated in an attempt to escape. A high-speed chase ensued through mid-town Memphis and into a residential neighborhood, where Cone abandoned his automobile and proceeded on foot. (*Id.*) As he fled from police, Cone shot one of the police officers who attempted to arrest him, shot a citizen who challenged him, pulled a gun on a third person and demanded that the latter give Cone his automobile. When the owner of the automobile fled, Cone snapped his pistol several times, but the ammunition in the weapon had been exhausted. (*Id.*)

Cone managed to elude police on August 9th but appeared at the door of a home in the same neighborhood early the next morning and asked to use the phone. When the elderly resident, Lucille Tuech, refused him admittance, Cone drew his pistol and pointed it at her. Ms. Tuech quickly slammed the door, ran to another part of the house, and called the police. (*Id.*; R. 4, Add. 1, Vol. XII, pp. 1207-08) Later that same afternoon, Cone broke into the home of Shipley and Cleopatra Todd, who lived a short distance from Ms. Tuech. Mr. Todd was 93 years of age; his wife was 79. The couple's bodies were found three days later after authorities were alerted by anxious relatives. Both victims had been beaten to death. (Pet. App. 86) Mr. Todd sustained 16 blows, mostly to the back of the head, and Mrs. Todd sustained 22 blows to the

back and left side of the head; defensive wounds were present on the hands of both. The cause of death to both victims was multiple blunt trauma to the head inflicted by an instrument consistent with a gun. (R. 4, Add. 1, Vol. XIII, pp. 1293, 1295-96, 1298-1300) Cone's fingerprints and hair samples were found in the Todds' home, which had been ransacked, and he was apparently able to steal enough money from their home to fly from Memphis to Florida, where he appeared at the home of an acquaintance on August 12. (Pet. App. 86)

At trial, Cone did not dispute killing the Todds but claimed that he was insane at the time of the crimes or lacked the requisite mental capacity to commit the offenses. Cone presented the testimony of two expert witnesses to support his defense. Matthew Jaremko, a clinical psychologist, opined that Cone suffered from two interrelated disorders: a substance-abuse disorder and post-traumatic stress disorder. The substance-abuse disorder was caused primarily by post-traumatic stress disorder, which arose from Cone's exposure to combat trauma in Vietnam and his continuing trauma after returning home as a veteran of an unpopular war. (J.A. 12) According to Jaremko, Cone's post-traumatic stress disorder manifested itself over the years in the form of flashbacks, nightmares, depression, nervousness, and sleep disorders. (J.A. 12-13) Dr. Jaremko testified that, in his opinion, Cone was suffering from a mental illness in August 1980, which rendered him incapable of conforming his conduct to the requirements of the law. He further testified that Cone expressed remorse for what happened. (J.A. 14)

Jonathan Lipman, a neuropharmacologist, testified that he examined Cone and detailed his history of drug abuse. Dr. Lipman testified that Cone had no history of drug abuse until the age of 18, when he was first exposed to hashish while serving in the Army in Germany. Cone was later introduced to opium and amphetamines while serving in Vietnam, where he was reportedly issued amphetamines for 53 consecutive nights to maintain alertness while on guard duty. (J.A. 18) According to Dr. Lipman, that pattern of amphetamine use continued throughout the rest of Cone's history. Dr. Lipman opined that, in August 1980, Cone was suffering from chronic amphetamine psychosis, which prevented him from knowing the wrongfulness of his acts and rendered him substantially incapable of conforming his conduct to the requirements of the law. (J.A. 18-19)

In addition to expert testimony, Cone's mother, Valeree Cone, testified that she had noticed a change in her son after his return from Vietnam. She testified that Cone acted like he was "in another world" and slept very badly. He spoke to her about handling bodies while he was in Vietnam and the condition the bodies were in. (J.A. 9-10) She further testified that Cone did not laugh or cry, but seemed to be "just holding it in." (J.A. 10) In rebuttal, the State offered two mental health experts, neither of whom found any basis for an insanity defense. (Pet. App. 90-91)

The jury rejected Cone's insanity defense, convicting him at the conclusion of the guilt phase of two counts of first degree murder, three counts of assault with intent to commit first degree murder, and robbery by use of a deadly weapon. (Pet. App. 84) At sentencing, the State

relied on four aggravating circumstances to support imposition of the death penalty: (1) that Cone was previously convicted of one or more felonies, other than the present charge, involving the use or threat of violence to the person; (2) that Cone knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder; (3) that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (4) that the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another. Tenn. Code Ann. §§39-2-203(i)(2), (3), (5), and (6) (1982). (J.A. 22-23, 50-52)

Through the testimony of a court clerk and a fingerprint examiner, the State established that Cone had three prior convictions for robbery with a firearm. (J.A. 28-29, 34-35) In addition, the State recalled at sentencing two Memphis police officers who had been involved in the initial efforts to apprehend Cone after the jewelry store robbery. Both officers testified that Cone evaded arrest. (J.A. 36-40)

Although defense counsel presented no direct evidence in mitigation, in an opening statement at sentencing, Cone's counsel explained to the jury that the defense would rely upon mitigating evidence presented during the guilt phase of trial:

> I believe his Honor will tell you that [sic] was presented in the main portion of this case can be considered by you in considering both aggravating and mitigating circumstances. . . . The Defense has put on proof of those mitigating

> circumstances during its case, and I would like to review those with you. . . .

(J.A. 24)[1] Counsel then reiterated certain aspects of the guilt-phase evidence, particularly the testimony of Drs. Lipman and Jaremko, arguing that the proof supported application of three specific statutory mitigating circumstances. (J.A. 24-25) Counsel further argued in support of non-statutory mitigating factors, emphasizing, as he had done throughout the trial, Cone's military service:

> I suggest to you that Dr. Jaremko stated, in his interview with my client, my client has expressed remorse for his conduct. That is not a statutory mitigating circumstance, but it is a circumstance that you can consider, as the General says, under the rule. And I asked all of you, each and every one of you, to look at the whole man in this case, when we began. And I suggest to you that proof has been put in this record that he is an honorably discharged veteran of his country, and I ask you to look at that in light that there is no evidence of any kind, of any nature, in this record, other than the fact that his drug abuse began under the stress and strain of combat service. And I suggest to you that that is a mitigating circumstance.

(J.A. 25-26)

Finally, trial counsel asked the jury for mercy on behalf of his client:

> [T]here is good reason for maintaining life if you look at the whole man in this particular case. . . .

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[1] The jury was so instructed by the trial court at the conclusion of the sentencing phase. (J.A. 53)

> [O]ur ethics have been questioned, the defense team. If we're unethical to seek mercy, then I am unethical. But mercy is – it's a double blessing. It's a blessing to the person who gives, and it's a blessing to the person who receives. And I would say to you that mercy – if you consider life under the mitigating circumstances, and the aggravating circumstances in this case – raises you above the State, raises you above the King, if you will. It raises you to the level of God.

(J.A. 26)

On cross-examination of a State's witness in the sentencing phase, defense counsel elicited information showing that Cone was awarded a Bronze Star for his military service in Germany and Vietnam and was honorably discharged from the United States Army in July 1969. (J.A. 31) Counsel successfully prevented the State from introducing gruesome photographs depicting the condition of the victims' bodies on the day they were discovered. (J.A. 41-49) The trial court also sustained other objections posed by defense counsel throughout the course of the sentencing phase. (J.A. 37, 38)

The jury returned verdicts of death for each of the two murders, finding that the State had proven all four aggravating circumstances beyond a reasonable doubt and that there were no mitigating circumstances sufficiently substantial to outweigh those aggravating circumstances. (R. 4, Add. 1, Vol. XX, pp. 2223, 2225) The Tennessee Supreme Court affirmed Cone's convictions

and sentences on direct appeal[2] (Pet. App. 84), and this Court denied certiorari. *Cone v. Tennessee*, 467 U.S. 1210 (1984).

2. Cone initiated state post-conviction proceedings in June 1984, alleging, among other things, that trial counsel was ineffective at the penalty phase of trial in failing to present proof of mitigating circumstances and in waiving final argument. (R. 4, Add. 2, Vol. I, p. 51) The trial court conducted an evidentiary hearing on Cone's claims. Among the witnesses presented by Cone were two attorneys licensed in Tennessee, who offered their opinions regarding the wisdom of waiving closing argument in a capital sentencing hearing and of relying upon guilt-phase proof for mitigation. (R. 4, Add. 2, Vol. II, pp. 69-82, 180-89) Cone also presented the testimony of his mother, who testified that she would have pled for her son's life in the penalty phase if asked. (R. 4, Add. 2, Vol. III, pp. 192-94)

Cone's trial counsel, John Dice, testified that he investigated Cone's background (J.A. 61-62) and chose not to put on additional character witnesses at sentencing to prevent the prosecution from bringing out negative information on cross-examination. (R. 4, Add. 2, Vol. II, pp. 104-05, 136-38) Counsel did not think that Cone's

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[2] The Tennessee Supreme Court found that the aggravating circumstance under Tenn. Code Ann. §39-2-203(i)(3) (1982) (risk of death to two or more persons) was inapplicable to an extended criminal episode, such as the one here. But because the jury clearly found three other aggravators, the Court found that any error with respect to the (i)(3) circumstance was harmless beyond a reasonable doubt. *State v. Cone*, 665 S.W.2d 87 (Tenn. 1984). (Pet. App. 98-99)

mother had been a good witness at the guilt phase and chose, for tactical reasons, not to recall her at sentencing. (J.A. 63) Although Cone's sister initially agreed to testify for Cone, she ultimately changed her mind, and counsel testified that there was disagreement among family members about aspects of Cone's "family dynamics." (R. 4, Add. 2, Vol. II, p. 135; Vol. III, pp. 157-58)

The criminal court entered findings of fact and conclusions of law denying post-conviction relief. (J.A. 78) Specifically, the criminal court found that trial counsel had put a great deal of thought and preparation into the case and had interviewed numerous family members and relatives, whose testimony was contradictory and generally not helpful. The trial court credited trial counsel's testimony that his strategy was to introduce as much mitigation as he could during the guilt phase of trial. (J.A. 83-84) As to the waiver of final argument, the trial court concluded that it was a strategic decision in view of the prosecutor's reputation for devastating closing arguments. (J.A. 84) In its written order denying post-conviction relief, the criminal court identified *Strickland v. Washington*, 466 U.S. 668 (1984), and *Darden v. Wainwright*, 477 U.S. 168 (1986), as the controlling legal authority on Cone's claim of ineffective assistance. (J.A. 84)

Citing *Strickland, supra*, the Tennessee Court of Criminal Appeals affirmed the decision of the trial court, likewise rejecting Cone's contentions that trial counsel was ineffective at the penalty phase of trial. As to the presentation of mitigating evidence, the court found that Cone had demonstrated neither deficient performance nor prejudice:

> The appellant [Cone] stated that two medical experts who testified for the defense at the guilt phase of the trial should have been reintroduced to testify at the penalty phase as to the appellant's mental state at the time the crimes were committed. He also contends that his mother should have been reintroduced to testify concerning his early childhood.
>
> The trial court accredited the testimony of the defense attorney during which he explained that this evidence had been presented during the guilt stage of the proceeding. Trial counsel was aware that the trial judge would instruct the jury that it could consider mitigating circumstances proved at the guilt stage of the trial. Defense counsel also testified that the appellant's mother did not make a good witness at the guilt stage of the trial and in his judgment, the best tactic was to not subject her to further cross examination.
>
> The appellant complains because defense counsel did not introduce other relatives and associates to testify concerning his early childhood. Defense counsel testified that these potential witnesses were interviewed by him and that he concluded that there was a danger that cross examination would elicit additional criminal activity on the part of the appellant. There is nothing in the record to show that the testimony of these witnesses would have benefited the defense. In the absence of this showing, we will not presume that trial counsel erred in not calling them as witnesses.

(Pet. App. 108-09)

Regarding counsel's waiver of closing argument, the court stated:

> One of the prosecuting attorneys made a low-key opening argument after the punishment hearing. It was trial counsel's judgment that he should waive argument to prevent the other prosecuting attorney from making closing argument. The other prosecutor was capable of making very devastating closing arguments and he could not be answered by defense counsel. This is a legitimate trial tactic, the exercise of which furnishes no basis for a finding of ineffective assistance. . . .
>
> The question of what witnesses to use and whether to waive final argument are tactical questions upon which competent lawyers might disagree. It cannot be said that incompetent representation had occurred merely because other lawyers, judging from hindsight, might have made a better or different choice of tactics.

(Pet. App. 110)

Finally, assessing counsel's overall performance, the Tennessee appellate court found:

> Trial counsel made a diligent and thorough investigation of the facts and the law. Although the appellant was without funds, trial counsel was able to procure a defense team composed of himself, a research expert, medical experts, and an investigator. No stone was left unturned in the preparation of the appellant's defense. Trial counsel was very conscientious in representing the appellant and placed much thought and effort into the tactical aspects of this case. However, trial counsel's work and diligence could not remove the overwhelming evidence against the appellant, both on the factual issue and insanity issue. In our view, the findings of guilt and the imposition of the death penalty were based upon the facts and the law – not by shortcomings of counsel.

(Pet. App. 111)

3. Cone sought federal habeas relief in July 1997, asserting numerous grounds, including ineffective assistance based on counsel's failure to introduce mitigating evidence and waiver of closing argument at sentencing. (R. 71, pp. 21-22) The district court summarily dismissed Cone's ineffective assistance of counsel claim, finding in pertinent part that Cone failed to demonstrate any prejudice from the failure of his trial counsel to introduce mitigating evidence at sentencing. (Pet. App. 78-80) The district court further found that Cone failed to meet §2254(d)(1)'s threshold requirement that a habeas petitioner demonstrate the state court's rejection of his Sixth Amendment claim "involved an unreasonable application of clearly established Federal law." (Pet. App. 80)

As to counsel's waiver of closing argument at sentencing, the district court found that Cone failed to offer any basis to dispute the state court's determination that the decision was a tactical choice to foreclose rebuttal argument by the prosecution and, further, that the state appellate court's decision on the issue was "a reasonable application of Sixth Amendment standards to the facts presented in the state post-conviction proceedings." (Pet. App. 80-81) The district court denied relief on all remaining claims and dismissed Cone's petition entirely on January 29, 1999. (R. 170)

The court of appeals reversed and remanded the case to the district court with instructions to issue a writ of habeas corpus vacating Cone's death sentences due to ineffective assistance of counsel at sentencing. Contrary to the findings of both the Tennessee state courts and the district court, the court of appeals concluded that counsel's decision not to present evidence at sentencing and to make no final argument amounted to constitutional ineffectiveness. (Pet. App. 37) As to the failure to present evidence at the sentencing stage, the court of appeals merely stated, "[C]ounsel had plenty of mitigating evidence at his fingertips; yet he failed to present it at the sentencing phase." (Pet. App. 35) Further, the court of appeals rejected the Tennessee courts' conclusion that counsel's decision to waive final argument was a legitimate tactical decision, concluding instead that the explanation given by Cone's counsel for waiving closing argument was "totally unreasonable," and stating:

> We reject out of hand, the argument that a competent attorney would determine that not presenting mitigating evidence of any kind and not making a final argument in a death penalty case is a justifiable "strategy" because doing so might trigger a "devastating" response by the prosecutor – the sole reason assigned by the Tennessee courts for excusing counsel's silence. How much worse off could Cone have been if he were sentenced to death after a "devastating" argument by the prosecutor than if he were sentenced to death after the prosecutor's "mild" request that he be sentenced to death, which was followed by his own attorney's silence? Or, asked differently: How much more devastating for the petitioner could the prosecutor's "devastating" argument have been than the death sentence the petitioner got without such argument?

(Pet. App. 35-36)

The court of appeals then determined that Cone need not show actual prejudice under the second prong of *Strickland*, because a presumption of prejudice under *United States v. Cronic*, 466 U.S. 648 (1984), was raised by counsel's behavior. (Pet. App. 37) The court reasoned that the prosecutor's insistence at the sentencing phase that Cone be put to death had not been subjected to "meaningful adversarial testing" and that counsel had "abandoned" Cone at a critical stage of his trial. (Pet. App. 37)

SUMMARY OF THE ARGUMENT

1. As amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. §2254(d), in pertinent part, prohibits a federal habeas court from granting relief on a claim adjudicated on the merits in state court proceedings unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . ." 28 U.S.C. §2254(d)(1). Simply put, AEDPA removed the authority of a federal court to disturb a state court judgment based upon its independent determination that the state court erred in deciding a constitutional question. As this Court explained in *Williams v. Taylor*, 529 U.S. 362, 410 (2000), the most important distinction between review under the present §2254(d) and pre-AEDPA

review is that "an *unreasonable* application of federal law [by a state court] is different from an *incorrect* application of federal law." A state court decision that is merely incorrect, but not unreasonable, may no longer be disturbed on habeas review.

Nevertheless, en route to vacating Cone's death sentences imposed over 19 years ago by a Tennessee jury, the court of appeals began its analysis with the clearly erroneous assertion that its review of Cone's ineffective assistance of counsel claim should be *de novo*. (Pet. App. 30-31) Although the Tennessee courts had previously determined that Cone's trial counsel made reasoned tactical decisions regarding the presentation of mitigation evidence and waiver of closing argument at sentencing, and that neither alleged attorney error had prejudiced the defense, the court of appeals rejected those conclusions "out of hand," and, without any analysis of how counsel's alleged deficiencies could have affected the outcome, presumed prejudice. While the court of appeals paid lip service to AEDPA by quoting the pertinent provision in the final paragraph of its opinion, compliance with §2254(d) requires more than mere talismanic recitation of its language. The court of appeals' actual analysis of Cone's ineffective assistance claim, indistinguishable from that employed in pre-AEDPA cases, belies its asserted application of §2254(d).

The Tennessee courts, in assessing Cone's claims, fully comprehended and reasonably applied the *Strickland* standard for judging the performance of counsel under the Sixth Amendment, heeding this Court's instruction that "[j]udicial scrutiny of counsel's performance must be highly deferential" and recognizing the

Sixth Amendment's strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Thus, because the decision of the Tennessee courts was neither contrary to nor an unreasonable application of *Strickland*, federal habeas relief was barred by §2254(d).

2. Compounding its error under §2254(d), the court of appeals applied a presumption of prejudice to find a Sixth Amendment violation under the auspices of *United States v. Cronic*, 466 U.S. 648 (1984), ignoring the finding of the Tennessee appellate court that Cone's convictions and sentences were the result of "overwhelming evidence" against him, and not "shortcomings of counsel." But this Court has recognized only three narrow exceptions in which prejudice may be presumed to find a violation of the Sixth Amendment right to counsel: (1) where counsel is denied altogether; (2) where the state interfered with counsel's representation; and (3) where counsel is burdened with an actual conflict of interest that affects his or her performance. Aside from those circumstances, however, where a claim of ineffective assistance of counsel rests upon some articulable error by counsel in the course of representation, and where the "surrounding circumstances" do not prevent counsel's effective functioning, a defendant must affirmatively demonstrate both deficient performance and prejudice as a result of attorney error. Cone's ineffective assistance claim in this case was premised upon specific allegations of attorney error – the failure to present mitigation evidence and waiver of closing argument at sentencing. Cone was not without counsel during the sentencing

phase, nor was his lawyer precluded from rendering effective assistance by some structural impediment. To the contrary, Cone's lawyer conducted a thorough pretrial investigation, presented lay and expert witnesses in support of a mental health defense at trial, cross-examined the State's witnesses, and addressed the jury on his client's behalf at both the guilt and sentencing phases of trial. The quality and effect of the lawyering afforded Cone was fully capable of assessment under *Strickland*, and the Sixth Circuit erred in relieving Cone of his burden of proving both components of that standard.

ARGUMENT

I. THE COURT OF APPEALS EXCEEDED ITS AUTHORITY BY GRANTING HABEAS RELIEF ON RESPONDENT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, WHERE THE SAME CLAIM HAD BEEN PREVIOUSLY REJECTED ON THE MERITS IN STATE COURT PROCEEDINGS.

In 1996, Congress curtailed the power of federal courts to grant habeas relief to state prisoners through passage of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1219 (1996) ("AEDPA"). Under pre-AEDPA habeas law, federal courts reviewed "mixed" constitutional questions (*i.e.*, those involving application of constitutional law to facts) *de novo* with a presumption of correctness as to factual findings by the state courts. *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Townsend v. Sain*, 372 U.S. 293 (1963) (using the terms "independent," "*de novo*," and "plenary" to

describe pre-AEDPA habeas review of state court findings). By enacting §2254(d)'s general rule of prohibition, Congress abolished *de novo* review of mixed questions of law and fact that have been previously adjudicated on the merits in state court proceedings. No longer may a federal court issue the writ based upon its independent judgment that the state court decision was incorrect. Rather, as this Court explained in *Williams v. Taylor*, 529 U.S. 362 (2000), a federal court's inquiry on such claims is limited to the *reasonableness* of the state court's application of clearly established federal law. *Id.*, 529 U.S. at 412.

In this case, filed after enactment of AEDPA and therefore subject to its provisions, *Lindh v. Murphy*, 521 U.S. 320, 336 (1997), the court of appeals' analysis, while purporting to comply with the mandates of 28 U.S.C. §2254(d)(1) (Pet. App. 37), began with the clearly erroneous assertion that its review of Cone's ineffective assistance of counsel claim would be *de novo*. (Pet. App. 30-31) The court then compounded its error by conducting an independent re-assessment of defense counsel's testimony during the state post-conviction proceedings and by rejecting outright the findings of the state courts with respect to that testimony. (Pet. App. 35-36) In concluding that Cone was denied effective assistance of counsel at sentencing, the court of appeals completely disregarded the prior adjudication of the Tennessee state courts and, essentially, substituted its judgment instead. In so doing, the federal court exceeded its statutory authority to grant the writ and directly contravened this Court's decision in *Williams v. Taylor, supra*.

A. Scope of Review under §2254(d)(1)

The relevant provision of AEDPA, 28 U.S.C. §2254(d)(1), prohibits a federal court from granting habeas relief to a state prisoner with respect to a claim adjudicated on the merits in state court unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." In *Williams*, this Court resolved a conflict among the circuits regarding the proper interpretation of that provision.

First, the Court instructed that the "contrary to" and "unreasonable application" clauses of §2254(d)(1) have independent meaning. *Id.*, at 404. The Court explained that a state court decision will be "contrary to" its clearly established precedent if the state court either "applies a rule that contradicts the governing law set forth in our cases," *id.*, at 405, or if the state court "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Id.*, at 406.

Second, the Court explained that a state court decision involves an "unreasonable application" of this Court's precedent if the state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.*, at 407-08. In making that inquiry, a federal court must assess whether the state court's application of clearly established federal law was "objectively unreasonable." *Id.*, at 409. Observing that Congress specifically used the term "unreasonable," as opposed to terms like "erroneous" or

"incorrect," the Court further instructed that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.*, at 411.

Finally, the Court interpreted the language "clearly established Federal law, as determined by the Supreme Court of the United States." That statutory phrase refers to "holdings as opposed to dicta" of this Court's decisions as of the time of the state court decision. *Id.*, at 412.

Thus, under *Williams*, a federal court's review of a state court's decision under §2254(d)(1) involves a two-part inquiry: first, whether the state court correctly identified the governing legal rule; and second, whether the state court applied that rule in an objectively reasonable way to the facts of the prisoner's case. When that standard is applied to the Tennessee courts' rejection of Cone's ineffective assistance claim, it cannot be said that the state court's decision contravened controlling case law or involved an unreasonable application of that case law.

B. The Tennessee state courts correctly identified the governing legal rule.

The threshold question under §2254(d) is whether the state court correctly identified the governing legal rule. As this Court noted in *Williams*, the merits of a claim of ineffective assistance are "squarely governed" by the holding in *Strickland*. Moreover, "[i]t is past question that

the rule set forth in *Strickland* qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.' " *Williams*, 529 U.S. at 390-91. Thus, a state court decision that fails to apply *Strickland* to an ineffective assistance of counsel claim would be "contrary to" clearly established precedent of this Court and an exception to §2254(d)'s general rule of prohibition.[3]

The *Strickland* rule for evaluating Sixth Amendment claims of ineffective assistance of counsel has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable.

Strickland, 466 U.S. at 687.

To establish a claim of ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id.*, at 687-88. This Court instructed that the reasonableness of

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[3] In *Williams*, for example, this Court held that the Virginia Supreme Court's determination that *Lockhart v. Fretwell*, 506 U.S. 364 (1993), modified or supplanted *Strickland* (requiring a separate inquiry into fundamental fairness, even when the defendant is able to show both deficient performance and prejudice) was "contrary to" established federal law. *Williams*, 529 U.S. at 393-95.

counsel's challenged conduct must be judged on the facts of the particular case, "viewed as of the time of counsel's conduct." *Id.*, at 690. Judicial scrutiny of counsel's performance must be "highly deferential," and a reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," bearing in mind that "[t]here are countless ways to provide effective assistance in any given case." *Id.*, at 689-90. A defendant challenging counsel's performance "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.*, at 689. To establish prejudice under *Strickland*, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, at 694.

In the state post-conviction proceedings at issue here, the trial court correctly identified *Strickland* and *Darden v. Wainwright*, 477 U.S. 168 (1984), as the controlling legal authority. (J.A. 84) Finding that counsel's performance "did not fall below the objective standard of reasonableness" required under the Sixth Amendment, *Strickland*, 466 U.S. at 687-88, the court denied relief. (J.A. 84) On appeal, the Tennessee Court of Criminal Appeals likewise identified *Strickland* as controlling precedent (Pet. App. 107) and affirmed the trial court's determination that counsel was not ineffective. In addition, the state appellate court found that Cone failed to establish prejudice from counsel's alleged deficiencies: "In our view, the findings of guilt and the imposition of the death penalty

were based upon the facts and the law – not by shortcomings of counsel." (Pet. App. 111)

The Sixth Circuit's decision simply to presume prejudice, citing *United States v. Cronic*, 466 U.S. 648 (1984), is directly contrary to *Strickland*, which held that to establish a claim of "actual ineffectiveness" of counsel at trial, a defendant must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 683, 694. While it is true that *Strickland* recognized that there are a few narrow situations in which prejudice may be presumed, *id.*, at 692, this case, in which Cone challenges deficiencies in counsel's actual performance at trial, is not one of them. *See* Argument II, *infra* pp. 39-41.

> Conflict of interest claims aside, *actual ineffectiveness claims* alleging a deficiency in attorney performance are subject to a general requirement that the defendant *affirmatively prove prejudice*. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. . . . Even if a defendant shows that particular errors of counsel were unreasonable, therefore, *the defendant must show that they actually had an adverse effect on the defense.*

Strickland, 466 U.S. at 693 (emphasis added).

Nor could it be said that the state courts unreasonably failed to extend the principle of "presumed prejudice" under *Cronic* to the facts of this case. This Court has made

clear that, "in cases involving mere 'attorney error,' we require the defendant to demonstrate that the errors 'actually had an adverse effect on the defense.' " *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) (quoting *Strickland*, 466 U.S. at 693). Further, as noted in *Williams*, "the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims." *Williams*, 529 U.S. at 391. Cone's ineffective assistance claim was premised upon specific allegations of attorney error. Thus, both the trial and appellate courts in the state post-conviction proceedings analyzed Cone's ineffective assistance claim under the correct legal standard; the Sixth Circuit did not.

C. The Tennessee state courts' application of *Strickland* to the facts of Cone's case was objectively reasonable.

Having correctly identified the governing law (in this case *Strickland*), a state court's application of that standard to the facts of a prisoner's case may be disturbed on habeas review only if "unreasonable" under §2254(d)(1). Although this Court acknowledged in *Williams* that the standard is difficult to define, it did provide guidance. First, the Court specifically rejected the subjective standard of review set out in *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996), in favor of a standard of objective reasonableness. Second, the Court emphasized that the "most important point" of the analysis is the critical distinction between an "unreasonable" application of federal law and an "incorrect" or "erroneous" application of federal law. *Williams*, 529 U.S. at 410, 412.

Since *Williams*, the circuits have divided over whether a federal court must first determine that the state court's decision was erroneous before considering whether the decision, if erroneous, involved an unreasonable application of federal law. In *Van Tran v. Lindsey*, 212 F.3d 1143 (9th Cir.), *cert. denied*, 531 U.S. 944 (2000), the court looked to the doctrine of "clear error" to determine what constitutes an "unreasonable application" of federal law, holding that when an independent review of the legal question by a federal court leaves the court with the "firm conviction" that clear error has occurred, the state court's decision must be reversed as an "unreasonable application" of clearly established federal law. *Van Tran*, 212 F.3d at 1153-54. "Requiring federal courts to first determine whether the state court's decision was erroneous, prior to considering whether it was contrary to or involved an unreasonable application of controlling law," the court reasoned, "promotes clarity in our own constitutional jurisprudence and also provides guidance for the state courts, which can look to our decisions for their persuasive value." *Id.*, at 1155.

But, as the Fourth Circuit observed in *Bell v. Jarvis*, 236 F.3d 149 (4th Cir. 2000) (*en banc*), *cert. denied*, 70 U.S.L.W. 3235 (2001), because a federal court may grant habeas relief only if the state court decision is contrary to, or an unreasonable application of, Supreme Court precedent, "any independent opinions we offer on the merits of the constitutional claims will have no determinative effect on the case before us, nor any precedential effect for state courts in future cases," constituting "at best . . . a body of constitutional *dicta*." *Jarvis*, 236 F.3d at 162. Nor are the state courts – as co-equal interpreters of the

federal Constitution and this Court's case law – in need of "guidance" by federal circuit courts in interpreting and applying this Court's precedent. *Id. Van Tran's* "clearly erroneous" standard would render meaningless Congress' use of the term "unreasonable" in §2254(d)(1), a result this Court sought to avoid in *Williams* by making a clear distinction between an "incorrect or erroneous application" of federal law and an "unreasonable application" of federal law. *Williams*, 529 U.S. at 410. The focus of a federal court's inquiry under §2254(d)(1) is not whether the federal court would find a constitutional violation if presented with a factual scenario identical to that in the state court, but the reasonableness of the state court's decision in light of the evidence before it. If reasonable minds could disagree as to the outcome, the state court's decision is not an unreasonable application of controlling federal law. *Williams*, 529 U.S. at 410 ("reasonable jurists" standard in the *Teague* context is an objective inquiry). *See* Brief of Amicus CJLF.

1. Failure to Present Mitigating Evidence at Sentencing

In state post-conviction proceedings, Cone challenged trial counsel's failure to present mitigating evidence at the penalty phase. (J.A. 82) At a hearing in state court, Cone's mother testified that she would have pled for her son's life at sentencing if asked. (J.A. 69) She also named specific family members and acquaintances who knew Cone well. According to Mrs. Cone, counsel asked "quite a few questions" about those individuals early in the case, but "later he discontinued asking." (J.A. 70-71,

74-77) Cone's trial counsel testified that he investigated Cone's background and chose not to put on additional character witnesses at sentencing to prevent the prosecution from bringing out negative background information on cross-examination. (R. 4, Add. 2, Vol. II, pp. 93, 104-05, 136-38) He stated that, although Cone's sister had initially committed to testify for Cone, she eventually changed her mind. He further indicated that there was disagreement among family members about aspects of Cone's "family dynamics." (R. 4, Add. 2, Vol. II, pp. 135-36; Vol. III, pp. 157-58)

The post-conviction judge found that trial counsel "put a great deal of thought and preparation in this case" and had "interviewed numerous family members and relatives." (J.A. 84) The court credited counsel's testimony that "his strategy was to get as much evidence in during the guilt/innocence phase as he could" and, citing this Court's decisions in *Strickland* and *Darden*, concluded that counsel's performance "did not fall below the objective standard of reasonableness" required by the Sixth Amendment. (J.A. 84) Likewise, on appeal, the Tennessee Court of Criminal Appeals found that counsel made a series of reasoned tactical decisions regarding presentation of mitigation proof at the sentencing phase of trial. (Pet. App. 108-10) The court credited counsel's testimony that he determined not to present additional evidence during sentencing because it had already been presented during the guilt phase and further found that counsel's decision not to recall Cone's mother at sentencing was a tactical decision to prevent harmful cross-examination. (Pet. App. 108-09)

This Court has stated that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," and "judicial scrutiny of counsel's performance must be highly deferential. . . . " *Strickland*, 466 U.S. at 689-90. In *Darden v. Wainwright*, 477 U.S. 168 (1984), the Court deferred to defense counsel's decision not to introduce mitigating evidence at a capital sentencing hearing where counsel had engaged in extensive pre-trial preparation, including obtaining a psychiatric report on the defendant with an eye toward mitigation, but for tactical reasons decided not to introduce that evidence at trial. *Id.*, 477 U.S. at 185-87. The Court concluded that the petitioner failed to overcome the strong presumption that the challenged action "might be considered sound trial strategy." *Id.*, at 186-87. Counsel's performance in Cone's case was far stronger in that mitigating evidence, through the testimony of a clinical psychologist and a neuropharmacologist, was actually presented during the guilt phase of trial. (J.A. 11-19) In *Darden*, the evidence was not presented at all. *Id.*, 477 U.S. at 184-86. Moreover, the Tennessee courts found that Cone's counsel made a "diligent and thorough investigation of the facts and the law." (Pet. App. 111)

Strickland itself involved a challenge to counsel's failure to present mitigation evidence at a capital sentencing hearing. *Strickland*, 466 U.S. at 675-76. In *Strickland*, the defendant pled guilty to three capital murder charges and chose to be sentenced by the trial judge without a jury recommendation. *Id.*, at 672. In preparation for the sentencing hearing, counsel spoke on the telephone with the defendant's wife and mother but did not meet with them

and did not otherwise seek out character witnesses, choosing instead to rely upon information that had come in at the plea colloquy. *Id.*, at 672-73. Again, this Court deferred to counsel's decision to forgo character evidence at sentencing in order to prevent the admission of additional harmful information. *Id.*, at 699. *See also Burger v. Kemp*, 483 U.S. 776, 794-95 (1987) (counsel's decision to present no mitigating evidence at sentencing not "outside the wide range of professionally competent assistance"). In view of *Strickland*, *Darden* and *Burger*, the state courts did not act unreasonably in concluding that counsel's decisions regarding the presentation of mitigating evidence were not constitutionally deficient.

In addition to finding no deficient performance in Cone's case, the state appellate court concluded that he failed to demonstrate prejudice. Under *Strickland*, this Court made clear that ineffective assistance claims premised upon a deficiency in attorney performance require that the defendant "affirmatively prove prejudice." *Strickland*, 466 U.S. at 693; *Flores-Ortega*, 528 U.S. at 481. Although Cone complained in state court that defense counsel was ineffective for failing to introduce other relatives and associates to testify about his background, none of those individuals testified at the post-conviction hearing. Nor did Cone's mother offer any specific testimony concerning Cone's background; she complained only that no evidence was presented concerning "what kind of person Gary was." (J.A. 77) Thus, given the complete absence of proof concerning what, if any, mitigating evidence these witnesses might have offered had they been called to testify at Cone's sentencing, the state court, once again, reasonably concluded that Cone had failed to carry

his burden of proving prejudice flowing from these alleged deficiencies in his attorney's performance. (Pet. App. 109)

Without explanation, the Sixth Circuit disregarded the state court findings. Although it asserted that "counsel had plenty of mitigating evidence at his fingertips," the court utterly failed to identify what that evidence might have been.[4] And just as in *Strickland*, given the evidence concerning the circumstances of Cone's crime and his record of other violent criminal activity, the largely unspecified "background evidence" that trial counsel failed to present "would barely have altered the sentencing profile presented to the [jury]." *Strickland*, 466 U.S. at 700.

2. Waiver of Closing Argument

The other alleged deficiency in trial counsel's performance at sentencing was his decision to waive closing argument. Trial counsel testified at the post-conviction hearing that he made that decision based on a number of strategic considerations, primary among them to prevent a strong closing argument by the more experienced prosecutor. (J.A. 67-68) Testimony in state court from a local attorney confirmed the prosecutor's strong argument skills. (R. 4, Add. 2, Vol. III, p. 183) Moreover, as Cone's counsel pointed out, he had already made what was

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[4] Because the district court specifically found that Cone procedurally defaulted his claims based on counsel's alleged failure to investigate and develop proof in mitigation and denied an evidentiary hearing, the claims at issue were evaluated based on the evidence available to counsel at the time he made the decision. (Pet. App. 77)

essentially a closing argument in his opening statement at sentencing. (J.A. 68) Both the post-conviction judge and state appellate court refused to second-guess counsel's decision, stating:

> One of the prosecuting attorneys made a low-key opening argument after the punishment hearing. It was trial counsel's judgment that he should waive argument to prevent the other prosecuting attorney from making closing argument. The other prosecutor was capable of making very devastating closing arguments and he could not be answered by defense counsel. This is a legitimate trial tactic, the exercise of which furnishes no basis for a finding of ineffective assistance.

(Pet. App. 110)

Although the Sixth Circuit "reject[ed] out of hand" the Tennessee courts' conclusions, dismissing counsel's explanation for waiving closing argument as "totally unreasonable"(Pet. App. 35-36), it did so in direct contravention of the teachings of *Strickland*. Epitomizing the sort of hindsight judgment expressly condemned by *Strickland*, the court of appeals queried, "How much more devastating for the petitioner could the prosecutor's 'devastating' argument have been than the death sentence the petitioner got without such argument?" (Pet. App. 36) As *Strickland* made clear, however, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. The state courts fully comprehended these admonitions and reasonably applied

them to conclude that counsel's decision to waive closing argument had been "a legitimate trial tactic." That conclusion can hardly be labeled unreasonable, particularly given the Sixth Amendment's "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

In adjudicating the merits of Cone's ineffective assistance claim, the Tennessee state courts found that defense counsel made a diligent and thorough investigation of the facts and the law, was conscientious in representing Cone, and placed much thought into the tactical aspects of the case. The state courts further found that counsel's diligence "could not remove the overwhelming evidence against the defendant, [and] the findings of guilt and the imposition of the death penalty were based upon the facts and the law – not by shortcomings of counsel." (Pet. App. 111) Those conclusions are fully supported by the record and reflect a well-reasoned application of *Strickland* and its progeny.

By contrast, the Sixth Circuit's unauthorized *de novo* review of Cone's ineffective assistance claim was fatally hamstrung by its glaring lack of familiarity with the record. The opinion below inexplicably asserts that counsel remained "completely silent" during the sentencing phase (Pet. App. 31), that he "declined to address the court and jury" (*id.*), that he "presented no mitigating evidence at all" (*id.*), and "did not even ask the jury to spare his client's life." (Pet. App. 33-34) But the record shows that counsel made an opening statement at sentencing in which he informed the jury that he would rely on mitigating evidence presented during the guilt phase. He reiterated aspects of that evidence, argued in support

of both statutory and non-statutory mitigating circumstances, and clearly asked the jury for mercy on Cone's behalf. (J.A. 23-27) Counsel elicited information on cross-examination of a State's witness showing that Cone had been awarded a Bronze Star for his military service (J.A. 31), was successful in preventing the State from introducing highly prejudicial photographs of the two murder victims (J.A. 41-49), and made other objections during the course of the sentencing phase that were sustained by the trial judge. (J.A. 37, 38) The Sixth Circuit's scathing criticism of counsel's performance – that "Cone may well have fared better if his counsel had left the courtroom entirely for the sentencing phase of trial" (Pet. App. 36) – is based upon a scenario that, quite simply, did not occur.

II. THE COURT OF APPEALS IMPROPERLY PRESUMED PREJUDICE TO FIND A SIXTH AMENDMENT VIOLATION, WHERE CONE'S CLAIM OF INEFFECTIVE ASSISTANCE RESTED UPON SPECIFIC ERRORS BY COUNSEL AT TRIAL.

Strickland enunciated the standard for addressing Sixth Amendment claims based on "actual ineffective assistance" of counsel at trial, 466 U.S. at 683-84, establishing a two-part test for such claims. First, a defendant must show deficient performance by counsel and, second, that counsel's deficient performance prejudiced the defense. *Id.*, at 687. The Court acknowledged that the variety of circumstances faced by defense counsel and the range of legitimate decisions regarding how best to handle a given case foreclosed development of "detailed rules" or guidelines for representation. *Id.*, at 688-89. Rather, courts "must indulge a strong presumption that

counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*, at 689. In addition, the Court emphasized that the purpose of the Sixth Amendment right to counsel is "to ensure that criminal defendants receive a fair trial." Thus, a defendant asserting a claim of ineffective counsel must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694. *See also Roe v. Flores-Ortega*, 528 U.S. 470, 482 (2000).

On the same day the *Strickland* opinion was issued, this Court also decided another ineffective assistance case, which limited the circumstances under which a reviewing court may presume prejudice to find a Sixth Amendment violation. In *United States v. Cronic*, 466 U.S. 648 (1984), the defendant was charged in a complicated check-kiting scheme that had been under government investigation for over four years. When defense counsel withdrew, the trial court appointed a young real estate lawyer only 25 days before trial. *Id.*, 466 U.S. at 649. On appeal, the Tenth Circuit found it unnecessary to inquire into counsel's actual performance at trial or its possible impact on the outcome. Instead, it inferred that Cronic had been denied effective assistance based on five general criteria related to the circumstances of the case: (1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel. *Id.*, at 652. This Court reversed, finding that a presumption of prejudice was appropriate only under circumstances that are "so likely to prejudice the accused that the cost of litigating their

effect in a particular case is unjustified," the most obvious being a complete denial of counsel. *Id.*, at 658. The Court instructed that "only when *surrounding circumstances* justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial." *Id.*, at 662 (emphasis added). While acknowledging that the five factors identified by the court of appeals might be relevant to an evaluation of a lawyer's actual performance in a particular case, the Court concluded that Cronic's case was not one in which the surrounding circumstances made it unlikely that he could have received the effective assistance of counsel. *Id.*, at 665-66. Moreover, the Court noted that, should he later pursue claims based on "specified errors made by counsel," those claims should be evaluated under the standard enunciated in *Strickland*. *Id.*, at 666 n. 41.

This Court has recognized only three narrow circumstances in which prejudice may be presumed. First, prejudice may be presumed where there has been a complete denial of counsel. Second, a presumption is permitted when the state interferes with counsel's assistance. *Cronic*, 466 U.S. at 659 and n. 25. Both of those circumstances are easily identified and, "because the prosecution is directly responsible, easy for the government to prevent." Moreover, prejudice to the accused in such circumstances "is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692 (citing *Cronic*, 466 U.S. at 658). Third, a more limited presumption of prejudice attaches "when counsel is burdened by an actual conflict of interest," provided that defendant

shows the conflict "adversely affected counsel's performance." *Smith v. Robbins*, 528 U.S. 259, 287 (2000) (quoting *Strickland*, 466 U.S. at 692); *see Cuyler v. Sullivan*, 466 U.S. 335, 350 (1980).

Aside from those circumstances, however, where a claim of ineffective counsel rests upon some articulable error by counsel in the course of representation, and where the "surrounding circumstances" do not prevent counsel's effective functioning, the *Strickland* analysis is fully competent to vindicate the accused's Sixth Amendment right to counsel. Bad lawyering, no matter how bad, does not justify invoking a *per se* presumption of prejudice under *Cronic*. As the First Circuit observed in *Scarpa v. Dubois*, 38 F.3d 1, 14 (1st Cir. 1994), *cert. denied*, 513 U.S. 1129 (1995), once it becomes necessary to examine the trial record to evaluate counsel's particular errors, the *per se* presumption is no longer justified by *Cronic*'s rationale of avoiding the cost of case-by-case litigation. To apply *Cronic* in such situations would "do little more than replace case-by-case litigation over prejudice with case-by-case litigation over prejudice *per se*." *Scarpa*, 38 F.3d at 14.

In *Roe v. Flores-Ortega*, *supra*, this Court recently reiterated that, because the right to effective counsel is recognized, not for its own sake, but for its effect on the ability of the accused to receive a fair trial, "absent some effect of challenged conduct on the reliability of the . . . process, the [effective counsel] guarantee is not implicated." *Flores-Ortega*, 528 U.S. at 482 (citing *Cronic*, 466 U.S. at 658). The Court thus concluded that, "in cases involving mere 'attorney error,' we require the defendant to demonstrate that the errors 'actually had an adverse effect on

the defense.' " *Id.* *See also Smith v. Robbins*, 528 U.S. 259, 287 (2000) (listing the three categories of cases where prejudice is presumed as: (1) denial of counsel; (2) state interference; and (3) where counsel is burdened with an actual conflict of interest).

Since *Cronic*, this Court has consistently rejected attempts to presume prejudice when the defendant's ineffective assistance claim is premised on specific acts or omissions of counsel. In *Flores-Ortega*, the Court refused to presume prejudice where counsel failed to file a notice of appeal without defendant's consent. *Id.*, 528 U.S. at 484. In *Robbins*, the Court refused to presume prejudice where counsel neglected to file a merits brief on appeal. *Id.*, 528 U.S. at 288-89. In both cases, the Court required that the defendant demonstrate both the performance and prejudice prongs of *Strickland* to sustain an ineffective assistance of counsel claim.[5] Indeed, to require any less in such cases would substantially undermine the "strong presumption of reliability" normally afforded judicial proceedings. *Flores-Ortega*, 528 U.S. at 482 (citing *Robbins*, 528 U.S. at 286). By contrast, the Court refused to apply the *Strickland* test or the harmless error standard under *Chapman v. California*, 386 U.S. 18 (1967), where the denial of counsel left the defendant completely without representation on appeal. *Penson v. Ohio*, 488 U.S. 75, 88-89

[5] The Court noted in *Robbins* that such errors are "neither 'easy to identify' (since it is necessary to evaluate a defendant's case in order to find error) nor attributable to the prosecution," the policy reasons offered in *Strickland* for the first two categories in which a presumption of prejudice is permissible. *Robbins*, 528 U.S. at 287 n. 15 (citing *Strickland*, 466 at 692).

(1988). Thus, it is clear from *Strickland* and its progeny that, where claims of ineffective assistance rest upon specific acts or omissions of counsel in the course of representation, application of both prongs of the *Strickland* analysis is required.

Despite the clarity of this Court's directions, some lower courts have extended *Cronic* to cases involving claims of attorney "error" in trial proceedings. *See, e.g., Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997), *cert. denied*, 523 U.S. 1133 (1998) (prejudice presumed where counsel failed to advocate "actively" his client's cause and expressed contempt toward client); *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991) (prejudice presumed where attorney failed to call any witnesses and conceded in closing argument that there was no reasonable doubt as to factual issues); *Osborne v. Shillinger*, 861 F.2d 612 (10th Cir. 1988) (prejudice presumed where counsel refused to pursue any non-statutory mitigating circumstances and argued client's actions were "atrocious"). *See also* Brief of Amici States. The court of appeals' decision in this case represents another impermissible extension of *Cronic*.

Here, the state post-conviction appellate court found that, "[a]lthough appellant was without funds, trial counsel was able to procure a defense team composed of himself, a research expert, medical experts, and an investigator. No stone was left unturned in the preparation of [Cone's] defense." (Pet. App. 111) Counsel's opening statement at trial outlined a clear theory of defense, which was reiterated throughout the trial proceedings – that Cone was damaged psychologically and physically (in the form of drug addiction) as a result of service to his

country in Vietnam, and that his actions in this case were directly attributable to that damage. (R. 4, Add. 1, Vol. X, pp. 551-53; J.A. 19-20) Counsel called lay and expert witnesses to support that theory during the guilt phase and actively cross-examined the State's witnesses in both the guilt and sentencing phases of trial. The Tennessee Supreme Court's opinion on direct appeal from Cone's conviction and sentence outlined significant aspects of Cone's proof presented in the guilt phase, including testimony of two expert witnesses, Drs. Jaremko and Lipman, as well as pertinent information about Cone's background. (Pet. App. 89-91) What is more, at the beginning of the sentencing phase, defense counsel carefully explained to the jury that the defense relied on mitigation proof presented during the guilt phase, as he was entitled to do under Tenn. Code Ann. §39-2-203(e) (1982)[6]; he argued in support of a number of statutory and non-statutory mitigating circumstances; and he asked the jury for mercy on behalf of his client. (J.A. 23-27)

Cone was not without counsel during the sentencing phase, nor was his lawyer precluded from rendering effective assistance by some extra-judicial structural impediment – "surrounding circumstances" – that might justify application of the *Cronic* presumption because their impact on the outcome of the trial was not capable

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[6] Tenn. Code Ann. §39-2-203(e) (1982) provides, in pertinent part: "After closing arguments in the sentencing hearing, the trial judge shall include in his instructions for the jury to weigh and consider any mitigating circumstances and any statutory aggravating circumstances set forth in subsection (i) of this section which may be raised by the evidence at either the guilt or sentencing hearing, or both."

of accurate measurement. Rather, the quality and effect of the lawyering afforded Cone was fully capable of assessment under *Strickland*. The Tennessee courts found that Cone received constitutionally effective assistance of counsel under that standard (Pet. App. 108-11) – a decision that the district court correctly recognized was neither contrary to, nor involving an unreasonable application of, clearly established federal law. (Pet. App. 77-81)

Despite the absence of proof of prejudice in the state post-conviction proceedings and an express finding by the state appellate court that no prejudice had occurred (Pet. App. 111), the court of appeals turned to *Cronic*, concluding that counsel failed to subject the prosecutor's insistence on the death penalty to "meaningful adversarial testing." (Pet. App. 37) The court's presumption of prejudice in this case obfuscates the entire rationale of *Cronic* and ignores the dictates of *Strickland*. To affirm the application of *Cronic* under these circumstances would essentially erect *per se* rules that counsel in capital cases must always present mitigation evidence, a result directly contrary to *Strickland*, *Darden* and *Burger*, *supra* pp. 29-30, and that counsel must always present closing argument at sentencing, a result incompatible with this Court's oft-repeated insistence that attorney performance be assessed on a circumstance-specific basis. *Flores-Ortega*, 528 U.S. at 478; *Strickland*, 466 U.S. at 688.

In *Engle v. Isaac*, 456 U.S. 107, 128 (1982), this Court observed that "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish

offenders and their good-faith attempts to honor constitutional rights." The court of appeals' unnecessarily expansive reading of *Cronic* in this case not only ignores the dictates of *Strickland*, but frustrates the substantial interests of comity, federalism and finality of judgments, a result Congress specifically sought to prevent through the enactment of AEDPA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 01-400

IN THE
Supreme Court of the United States

RICKY BELL, WARDEN

Petitioner,

V.

GARY BRADFORD CONE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Sixth Circuit, after holding that the rule of *United States v. Cronic*, 466 U.S. 648 (1984), controls Gary Cone's case, correctly determine that the state courts' choice of the wrong Sixth Amendment Rule is contrary to clearly established federal law under 28 U.S.C. §2254(d)(1)?

2. In analyzing Gary Cone's Sixth Amendment claim, did the United States Court of Appeals for the Sixth Circuit correctly apply *United States v. Cronic*, 466 U.S. 648 (1984), and presume prejudice upon finding counsel failed to subject Gary Cone's sentence of death to meaningful adversarial testing, by not presenting mitigating evidence and waiving closing argument in the penalty phase of a capital trial?

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STATEMENT OF THE CASE

Gary Bradford Cone was indicted for two counts of murder, three counts of assault with intent to commit murder, and one count of armed robbery after a crime spree culminating in the brutal beating death of an elderly couple. At trial, Mr. Cone was represented by attorney John Dice, who pleaded Mr. Cone not guilty by reason of insanity. The defense focused on Mr. Cone's Vietnam Veterans Syndrome and amphetamine psychosis as the cause for his legal insanity. At the close of the guilt phase of the trial, Mr. Cone was convicted on all counts.

A separate sentencing hearing followed, after which Mr. Cone was sentenced to death. The dispute before this Court concerns Mr. Cone's legal representation during that sentencing proceeding.

SENTENCING PROCEEDING

After the jury returned with a verdict of guilty as charged on all indictments, the prosecutor informed the jury in his opening statement that he intended to prove four aggravating circumstances in support of a death verdict. *See* Tenn. Code Ann. §§39-2404(i)(2),(3),(5),(6) (1977). (J.A. 22-23, 54-55)[1]

Mr. Dice then gave a brief opening statement in the penalty phase where he recalled to the jury the testimony in the guilt/innocence phase of Drs. Jaremko and Lipman about Vietnam Veterans Syndrome and

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[1] Citations to the joint appendix are referenced by the abbreviation "J.A." followed by the pertinent page number. Citations to the appendix to the petition for writ of certiorari are referenced by the abbreviation "Pet. App." followed by the page cited.

amphetamine psychosis. (J.A. 23-27)[2] Dice did not explain to the jury in his opening what is mitigating evidence. He failed to inform the jury why the mental health evidence they had just found insufficient to support a defense of amphetamine psychosis was nonetheless sufficient to count as mitigation and justify a life sentence. (J.A. 23-27) Dice did not insure that the jury understood its sentencing decision was not a mere quantitative counting of aggravating and mitigating circumstances, but a reasoned moral decision. (J.A. 23-27)

The state then called five penalty phase witnesses in an attempt to prove the aggravating circumstances. The state's first witness, the criminal court clerk, introduced records of Mr. Cone's previous Oklahoma robbery convictions. On cross examination of the clerk, Dice elicited that the conviction records introduced contain a classification summary which refers to Gary Cone receiving a bronze star. (J.A. 31) The Bronze Star is a U.S. Military

[2] Dr. Matthew Jaremko, a clinical psychologist on staff with the Memphis Veteran's Center, testified that Gary Cone suffers from a substance abuse disorder superimposed upon post traumatic stress disorder stemming from his involvement in the Vietnam War (J.A. 12). Gary Cone never used drugs prior to his service in Vietnam, but began using drugs as a way to self medicate against the trauma of combat. (J.A. 13-14) Dr. Jaremko testified that Mr. Cone's condition constituted a mental disease or defect that would render him incapable of conforming his conduct to the requirements of the law. (J.A. 14)

Dr. Jonathan Lipman, a neuropharmacologist, testified that Gary Cone was a poly drug user with amphetamines (stimulants) and cocaine being his drugs of choice. (J.A. 17) Mr. Cone's drug history began in Vietnam where on one occasion he used amphetamines for 53 straight days while on guard duty. (J.A. 18) Mr. Cone's drug use over time substantially increased, creating a condition known as amphetamine psychosis which produces a psychotic effect and prevented Mr. Cone from conforming his conduct to the requirements of the law. (J.A. 19)

decoration awarded for heroism or achievement in military operations other than those involving aerial flights, but this was never explained to the jury.[3] Dice did not cross examine any of the other penalty phase witnesses and called no mitigation witnesses. (J.A. 35, 38, 40, 50)

After the prosecutor delivered a closing argument telling the jury that under the law Gary Cone should be sentenced to death, John Dice waived closing argument. (J.A. 52) Thus, Dice did not present any evidence or argument in response to the prosecution's penalty phase case for death. The trial judge instructed the jury that upon the finding of at least one statutory aggravating circumstance, if "said circumstance or circumstances are not outweighed by mitigating circumstances, the sentence shall be death." (J.A. 57) The jury then returned a verdict of death, finding the four aggravating circumstances argued by the prosecution. (R4, Add. 1, Doc. 1, Tr. Vol. 20, pp. 2151-2154)[4]

On appeal, the Tennessee Supreme Court affirmed the conviction and death sentence. *State v. Cone*, 665 S.W. 2d 87 (Tenn. 1984). (Pet. App. 84) The Tennessee Supreme Court held one of the aggravating circumstances found by the jury to be inapplicable[5], but ruled the error to be harmless. (Pet. App. 96)

[3] *Webster's New Universal Unabridged Dictionary* (Random House, 2d ed. 1996) p.266

[4] The entire state court record of all proceedings in Mr. Cone's case was filed with the District Court, and assigned a single docket entry number, R4. The record is subdivided into addenda, and documents, which are even further subdivided and paginated.

[5] "The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder." Tenn. Code Ann. §§39-2404(i)(3) (1977).

STATE POST CONVICTION PROCEEDINGS

A state post conviction hearing was conducted on April 28th and 29th, 1986 in the Criminal Court of Shelby County, Tennessee. The issues raised on post conviction included whether:

- Trial counsel was ineffective for failing to offer proof of mitigating circumstances during the penalty phase of the trial.
- Trial counsel was ineffective for failing to make a closing argument during the penalty phase of the trial.

(Amended Post Conviction Petition ¶11a, R.4, Add. 2, Doc. 1, p. 51)

Dice testified in the post conviction hearing that he was retained to represent Mr. Cone. (R4, Add. 2, Doc. 1, Tr. p. 91) Dice recalled that he put on some proof as to Cone's Vietnam background through Gary's mother, Valerie Cone. (J.A. 63-64)[6] He acknowledged that his ability to introduce proof about Gary Cone's Vietnam service through Valerie Cone during the guilt/innocence phase of the trial was limited, due to the state's objection that the proof was not relevant to the insanity defense. (J.A. 63-64) Dice stated he knew the references to the Bronze Star were in the Oklahoma prison records, and he elicited the reference to the Bronze Star on cross

[6] Valerie Cone testified in the guilt/innocence phase that Gary graduated from high school and went into the army. (R4, Add. 1, Doc. 1, Tr. Vol. 15, pp. 1633-1634) After her son came back from the Vietnam War he was different. Gary Cone suffered from nightmares and did not sleep well. (J.A. 10) He hollered about body bags and how terrible it was to handle dead bodies being brought back from Vietnam. (J.A. 10) Prior to fighting in the Vietnam war Gary had not been a drug user or alcoholic. (R4, Add. 1, Doc. 1, Tr. Vol. 15, p. 1647)

examination of the clerk. (J.A. 64-65) Dice allegedly tried to get Gary Cone to testify, but Cone purportedly did not want to take the stand because Cone thought he might lose his temper in front of the jury. (J.A. 66) Dice also testified he was concerned about calling witnesses in mitigation to testify to Gary Cone's background, since he erroneously believed such witnesses could be used by the state in cross examination to develop other prior bad acts:

> Q. Why would it have been stupid to put on a high school principle [sic] in this case?
>
> A. ...Picture this scenario. You've got them on the stand; once you've put on this trial for life, as we call it, you and I, and the burden is what now? It's only preponderance of the evidence. Comes now the skilled prosecutor, Mr. Strother, over there, and says, oh, he was a good student in high school; right? And Vietnam affected his mind; right? What about all the robberies he pulled? They have him in prison in Oklahoma. I mean, he was in prison once. Did you know about those things? And how about this and that, you know and other things Mr. Cone told me about.
>
> So, in other words, many times I've seen people on these stands who were brought down as character witnesses and things like that, and I've heard people like Mr. Strother, as he is skilled in doing, get up and feeding that stuff and they hurt you more than they help you.

(R. 4, Add. 2, Doc. 1, Tr. pp. 104-105; *see also* Tr. pp. 137-138)

Since 1979, Tennessee law has clearly held that presenting mitigation evidence in the penalty phase of a capital trial as to a defendant's background does not open the door to testimony about present criminal proclivities. *Cozzolino v. State*, 584 S.W.2d 765, 768 (Tenn. 1979). Dice thus did not know the law concerning mitigation evidence since he thought mitigation testimony about Gary Cone's high school background, or how Vietnam affected his mind would "open the door" to testimony about unrelated later criminal acts.

In light of the hopelessness he felt concerning this case, part of Dice's strategy was to have the jury find an improper aggravating circumstance that he knew was not supported by the evidence, then have the case remanded for a new sentencing hearing at a later date:

> Now, so my tactics, and I told Mrs. Cone this the first day I met her, that if ...[the prosecutor] does not elect to offer life in this case, your boy is going to the chair and there's not going to be a darn thing, except I didn't use that word, I'm going to be able to do to stop it except to maybe screw up the prosecution, and in my viewpoint... if I could get him to screw up the aggravated [sic] circumstances in this case and set it back, the trial, then I thought we would have a good chance later on, because of the way capital cases are conducted, and sure enough, Mr. Strother got them going, got the jury going, and he convinced the jury in argument, he and Mr. Patterson, that, guess what, Mr. Cone endangered the life of two or more other people other than the victims at the time of the crime.
>
> The case law in Tennessee up to that point had consistently held that if a jury made an illegal

> finding of an aggravated [sic] circumstance, that ended the death penalty phase. And once I saw that, and this is the reason I waived my final argument in this case, for two reasons; Mr. Strother is also brilliant, as is Mr. Patterson, and if I'd let Strother get back up there, he might have figured out that, wait a moment, we've screwed this case up and it stands to be reversed. That strategy worked perfectly, ..., because the Supreme Court found out that they had made an illegal finding in their verdict, and unfortunately, the Supreme Court said, well, we know that's been the law before, Mr. Dice, but three of four ain't bad and he gets the chair.

(R4, Add. 2, Doc. 1, Tr. pp. 107-109)

Dice thus waived closing argument to prevent Mr. Strother from making a final rebuttal argument, and to allow the prosecution free reign to argue an aggravating circumstance not supported by the evidence. As a matter of "strategy" Dice anticipated his silence would allow the jury erroneously to find an aggravating circumstance, so his client would be sentenced to death in hopes of having the case remanded later for another sentencing hearing.[7]

John Dice committed suicide less than six months after the hearing. (J.A. 88) Dice's medical records (obtained in federal habeas corpus proceedings) indicate that at the time Dice testified in post conviction proceedings he suffered from "confused thinking, impaired memory, inability to concentrate for more than a short

[7] The Tennessee courts never announced a *per se* rule that the finding by a jury of an improper aggravating circumstance automatically mandates a new sentencing hearing. Dice's testimony to this effect is also erroneous.

period of time, paranoia, grandiosity, and inappropriate behavior." (J.A. 88-89)[8] As of February 7, 1986, two months prior to the post conviction hearing, Dice was deemed incompetent to continue practicing law by his psychologist. (J.A. 88)

Gary Cone testified in post conviction that Dice never discussed with him the strategy or proof that would be presented in the penalty phase of the trial. (R4, Add. 2, Doc. 1, Tr. p. 203) Gary Cone was not consulted with respect to Dice's decision not to present any mitigating evidence in the penalty phase, or with respect to Dice's decision to waive final argument. (R4, Add. 2, Doc. 1, Tr. pp. 204-205)

The post conviction court entered its findings of fact on September 19, 1986. (J.A. 78) The post conviction court found that Dice's strategy "was to get in as much mitigation during the guilt/innocence phase as he could." (J.A. 84) The court then found that Dice's decision to forego any evidence in mitigation did not fall below the objective standard of reasonableness set by the Sixth Amendment's guarantee of the effective assistance of counsel. (J.A. 84) With respect to the waiver of closing argument, the court found it was Dice's strategy to waive argument to prevent the prosecutor from making a "devastating" closing argument. (J.A. 84), The court found this to be a sound trial strategy.

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[8] Reading Dice's post conviction testimony corroborates the medical records findings of grandiosity. For example, Dice testified that he, along with a lawyer in New York first developed Vietnam Veteran's Syndrome as a defense across the country. (R4, Add. 2, Doc. 1, Tr. p. 92) Dice opined that one of his experts, Dr. Lipman, was "probably the leading research scientist in the world" in amphetamine psychosis. *Id.* Dice testified he filed hundreds of pre-trial motions in Gary Cone's case. (R4, Add. 2, Doc. 1, Tr. p. 165) The whole tone of Dice's testimony is melodramatic and grandiose.

On appeal, post conviction counsel urged the court to apply *U.S. v. Cronic*, 466 U.S. 648 (1984), and presume prejudice because in Cone's case there was a fundamental breakdown of the adversarial process:

> Because the duty to argue for a capital defendant's life is so fundamental, the failure to argue constitutes a fundamental breakdown of the adversarial testing process and hence no specific showing of prejudice is necessary. *See United States v. Cronic*, *supra* at 2047, n. 25
>
> (Post Conviction Appellate Brief, R 4, Add. 2, Doc. 2, p. 30; *see also* pp. 21-23)

The Tennessee Court of Criminal Appeals affirmed the post conviction court's findings that John Dice was effective. (Pet. App. 101) The Court of Criminal Appeals did not discuss the applicability of *Cronic*, even though it was argued by post conviction counsel as the applicable rule. In all other respects the Court of Criminal Appeals affirmed the post conviction trial court.[9]

HABEAS CORPUS PROCEEDINGS

Gary Cone then sought habeas corpus relief in the United States District Court for the Western District of Tennessee. The District Court did not apply *U.S. v. Cronic* to analyze Gary Cone's Sixth Amendment claims.

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[9] Gary Cone later filed a second state post conviction petition. All of the claims raised in this second petition were held procedurally barred by the state court on grounds that such claims were either waived or previously determined. *See Cone v. State*, 927 S.W. 2d 579 (Tenn. Crim. App. 1995).

Rather, the court erroneously applied *Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993).[10] Using this erroneous standard, the District Court held that Gary Cone "failed to carry his burden to demonstrate that the verdict was fundamentally unfair or unreliable" (Pet. App. 80) as required by *Fretwell*, and therefore he was not entitled to relief. The District Court also held that the Tennessee courts' rejection of Cone's Sixth Amendment claims did not "involve any unreasonable application of clearly established federal law" and thus dismissed his Sixth Amendment claims. (Pet. App. 80) Gary Cone's other claims were either held procedurally defaulted, or held to be barred by 28 U.S.C. §2254(d). The District Court denied habeas corpus relief.

On appeal the United States Court of Appeals for the Sixth Circuit found John Dice totally abdicated his role as an advocate in the penalty phase of the trial. The Court called Dice's purported strategy of failing to present a case for life "confusing" and "convoluted." (Pet. App. 34) The Sixth Circuit explained that during the penalty phase of a capital trial, the only conceivable goal is to persuade the jurors not to sentence Cone to death. (Pet. App. 35) The Court noted that the reason found by the trial court for Dice waiving closing argument was to prevent the prosecution making a rebuttal argument. Yet, the effect upon the jury of waiving argument was, by silence, an acquiescence to the prosecutor's plea that Cone must be sentenced to death:

> Cone may well have fared better if his counsel had left the courtroom entirely for the sentencing phase of the trial. If that had occurred, the jurors could not have inferred, as indeed they must

[10]This precisely was the analysis found erroneous by this Court in *Williams v. Taylor*, 529 U.S. 362 (2000).

> have, that counsel's knowing and purposeful silence was an implicit agreement that justice required that Cone be put to death.

(Pet. App. 36)

The Sixth Circuit found in essence Cone did not have counsel during the sentencing phase of his trial, and under *U.S. v. Cronic*, prejudice should be presumed. (Pet. App. 37) Because the Sixth Circuit granted sentencing relief, Mr. Cone's other claims challenging his sentence of death were pretermitted. (Pet. App. 28)[11]

On petition for writ of certiorari, the petitioner framed the following two issues for review by this Court:

I. By applying a *de novo* standard of review to a habeas petitioner's ineffective assistance of counsel claim, does the court of appeals' ruling conflict with *Williams v. Taylor*, 529 U.S. 362 (2000), which set the standard of review under 28 U.S.C. §2254(d)(1) for granting habeas corpus relief to state prisoners on claims that have been previously adjudicated on the merits in state court?

II. May a federal court of appeals bypass the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), and presume prejudice under *United States v. Cronic*, 466 U.S.648, (1984), to find a violation of the Sixth Amendment right to counsel, where defense counsel conducts a thorough

[11]Petitioner's brief incorrectly states that the Sixth Circuit applied a *de novo* standard of review to the state court findings and conclusions of law. (Petitioner's Brief, p. 33) It is clear in the Sixth Circuit opinion that the Sixth Circuit is reviewing the District Court's conclusions *de novo*, not the state courts' conclusions. (Pet. App. 6)

pretrial investigation, presents lay and expert witness testimony in support of a mental health defense at trial, conducts direct and cross examination, and addresses the jury at both the guilt and sentencing phase on behalf of his client, and where the state and district courts have previously determined that the defendant demonstrated no actual prejudice from any deficiencies identified in the attorney's performance?

(Petition for Certiorari, p. i).

Neither question presented by petitioner seeks review of the Sixth Circuit's holding that John Dice's representation of Gary Cone at the sentencing phase was deficient. Rather, the primary question raised before this Court is — given the extent of the deficient performance found by the Sixth Circuit, namely a total abdication of advocacy — should the Sixth Circuit have applied *Cronic* and presumed prejudice? The corollary issue presented asks whether, by failing to apply *U.S. v. Cronic*, did the state courts render a decision that was contrary to or an unreasonable application of clearly established federal law?

SUMMARY OF THE ARGUMENT

1. The Sixth Amendment to the United States Constitution guarantees an accused the right to the assistance of counsel for his defense in a criminal trial. In safeguarding this right, this Court has established different rules, applicable to different factual situations, to determine whether an accused's Sixth Amendment rights have been violated to the degree that mandates a new trial.

If an accused facing risk of imprisonment is not afforded counsel altogether, the Sixth Amendment is violated, and a defendant is awarded a new trial with the benefit of counsel. The rationale for automatic new trials in these cases stems from the advocate's role of ensuring an accused is afforded all the other constitutional safeguards surrounding a criminal trial. Without counsel, the prosecution's case is not subjected to meaningful adversarial testing, defense proof is not marshaled to counter the force of the state's case, and the finder of fact does not benefit from a balanced view of the evidence. In these cases, a trial with no counsel produces a result with no indicia of reliability, and the validity of the judgment is uncertain. In such cases it is not worth the cost of a case by case analysis to discern whether, notwithstanding the absence of counsel, the defendant nonetheless received a fair trial. Rather, it is presumed he did not. Simply put, for an adversarial proceeding to be fair, there must be two adversaries at work presenting and testing evidence.

Contrast the complete denial of counsel with cases where an attorney is present acting as an advocate for the accused, but the attorney makes specific errors during the trial, such as failing to make a specific objection. In these cases, this Court has required the defendant raising the Sixth Amendment claim to demonstrate that the error complained of somehow affected the outcome of the trial. *Strickland v. Washington*, 466 U.S. 668 (1984). An automatic new trial is not required because of a specific attorney mistake, since the accused has an advocate trained in the law that, though perhaps not perfect, nonetheless is generally subjecting the prosecution's case to adversarial testing, and presenting the accused's case to the finder of fact in its best light. In these cases, the court assumes a reliable verdict, unless the accused

can show that somehow the error complained of likely affected the outcome of the trial. Thus, if an attorney failed to object to an unconstitutionally vague aggravating circumstance in a capital sentencing proceeding, and the jury did not find such aggravating circumstance to be supported by the evidence, the attorney error could not be shown to have affected the outcome of the trial. In these cases, it is far easier for a reviewing court to conduct a case by case analysis to determine if specific errors "prejudiced" the defendant.

There are circumstances, however, when though an attorney is present at the criminal trial, such attorney totally fails to act as an advocate. In *United States v. Cronic*, 466 U.S. 648 (1984), this Court explained that an attorney's total failure to subject the prosecution's case to meaningful adversarial testing during a critical phase of a criminal trial should result in a presumption of prejudice. The same concerns as to the reliability of a verdict untested by an adversary, which result in the presumption of prejudice with the complete denial of counsel, are also present with a "constructive" denial of counsel. The lower courts have sparingly applied *Cronic* in situations such as a lawyer who sleeps through substantial portions of a capital trial; or when a lawyer berates his client in front of the jury, calling him derogatory names, making it as if his attorney is a second prosecutor.

In this case, Gary Cone's attorney failed to present a case for life in the sentencing phase of his capital trial. After the prosecution put forth evidence of aggravating circumstances, Cone's attorney failed to respond with any mitigation proof of his own. After the prosecution told the jury that Tennessee law obliged the jury to vote for death, the attorney replied by waiving closing argument. The effect before the jury was devastating. The jury was left with the impression that Gary Cone's

lawyer agreed that death was the required sentence, since he failed to counter the state's penalty phase case, and failed to disagree with the prosecutor's call for death. His silence implied his consent. The attorney's failure to make a case for life amounted to a total failure to subject the prosecution's case for death to meaningful adversarial testing. It would have been better had Gary Cone's lawyer not shown up for the penalty phase. At least then the jury would not have had the impression that Cone's own lawyer had given up, viewing death as the inevitable sentence. The Sixth Circuit properly applied *Cronic* in this case, and presumed prejudice due to the attorney's total abdication of advocacy in the penalty phase of Gary Cone's trial.

2. Federal law provides that relief may not be granted to a federal habeas petitioner challenging a state criminal conviction unless the state court decision was contrary to, or involved an unreasonable application of, clearly established law as determined by the Supreme Court of the United States. 28 U.S.C. §2254(d)(1). If this Court finds that the Sixth Circuit was correct in presuming prejudice in this case following *U.S. v. Cronic*; then it also follows that the state court decision refusing to apply *Cronic* is contrary to clearly established federal law.

This case thus closely parallels *Williams v. Taylor*, 529 U.S. 362, 405, 413 (2000)(O'Connor concurring), where this Court found the Virginia Supreme Court to have applied the wrong rule of law in analyzing an ineffective assistance of counsel claim in a capital sentencing proceeding. In *Williams*, this Court held that the Virginia Supreme Court's application of *Lockhart v. Fretwell*, 506 U.S. 364 (1993), to be contrary to clearly established federal law since *Strickland* was the correct rule the court should have applied. In the same way, if the Sixth Circuit is correct and *Cronic* provides the rule that governs this

case, then the state court decision applying *Strickland* rather than *Cronic* is contrary to clearly established federal law, and 28 U.S.C. §2254(d)(1) does not bar habeas relief.

ARGUMENT

I. THE A.E.D.P.A. DOES NOT BAR HABEAS RELIEF IN THIS CASE, SINCE THE STATE COURTS' CHOICE OF THE WRONG SIXTH AMENDMENT RULE IS CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW.

Certain provisions of the Anti-Terrorism and Effective Death Penalty Act, now codified at 28 U.S.C. §2254(d), limit instances when a state prisoner may obtain federal habeas relief. With respect to any claim adjudicated on the merits in state court, relief may not be granted unless the state court decision was not only wrong on the merits of the constitutional claim, but was also contrary to, or involved an unreasonable application of clearly established law as determined by the Supreme Court of the United States. 28 U.S.C. §2254(d)(1).

Here the question before the Court is whether the Sixth Circuit properly applied *U.S. v. Cronic*, 466 U.S. 648 (1984), to presume prejudice in Mr. Cone's capital sentencing hearing. (*See* Question Presented II) If the Sixth Circuit is correct and *Cronic* controls, then the state court decision refusing to apply *Cronic* would be contrary to clearly established law. In *Williams v. Taylor*, 529 U.S. 362, 405 (2000), Justice O'Connor delivered the Court opinion with respect to the proper construction of 28 U.S.C. §2254(d). Construing the "contrary to" clause, the Court recognized that a "state court decision will certainly be contrary to our clearly established precedent if

the state court applies a rule that contradicts the governing law set forth in our cases." *Id.* at 405. In analyzing the facts in *Williams*, Justice O'Connor noted that the clearly established law to be applied for a garden variety ineffective assistance of counsel claim alleging specific attorney error is the two prong test announced in *Strickland* discussed *infra*. The Virginia Supreme Court held in Williams' case that a later Supreme Court decision, *Lockhart v. Fretwell*, 506 U.S. 364 (1993), governed, requiring the defendant to demonstrate the criminal proceeding was fundamentally unfair or unreliable. *Williams*, 529 U.S. at 413-414. (O'Connor concurring) Justice O'Connor explained that the Virginia Supreme Court's decision in *Williams* was "contrary to" clearly established federal law because the Virginia court employed the rule of *Lockhart v. Fretwell*, instead of the rule of *Strickland v. Washington*, to adjudicate a case that should have been adjudicated under *Strickland's* rule. *Williams*, 529 U.S. at 413-414.

In the present case, the Sixth Circuit held that because there had been a complete breakdown of the adversarial process in the sentencing phase of Cone's trial, the governing rule for Cone's Sixth Amendment claim was that of *U.S. v. Cronic*. If that substantive ruling was correct, then the Tennessee Court of Criminal Appeals erroneously chose to apply the *Strickland* rule to a *Cronic* case, in the same way that in *Williams*, the Virginia Supreme Court erroneously chose the *Fretwell* rule to apply to a *Strickland* case. In both situations, the answer to the question "whether the state court correctly identified the governing legal rule" (Petitioner's Brief p. 21) is negative.

Petitioner's substantive quarrel with the Sixth Circuit decision (in Question Presented II of the petition for writ of certiorari) is precisely that the Sixth Circuit found the case

at bar governed by the *Cronic* rule rather than the *Strickland* prejudice rule. If this Court resolves the *Cronic* issue in Mr. Cone's favor, as counsel urges it should, then *Williams* dictates the Sixth Circuit's unremarkable conclusion that the Tennessee Court of Criminal Appeals application of *Strickland* prejudice standards to an issue governed by *Cronic* standards was "contrary to" *Cronic* within §2254(d) as construed by *Williams*.

II. THE UNITED STATES COURT OF APPEALS CORRECTLY PRESUMED PREJUDICE UNDER *US. v. CRONIC* IN ANALYZING GARY CONE'S SIXTH AMENDMENT CLAIM

A. The Sixth Amendment guarantees a criminal defendant the right to the effective assistance of counsel.

The Sixth Amendment to the United States Constitution assures that no person shall be subjected to criminal prosecution without the assistance of counsel:

> In all criminal prosecutions, the accused shall enjoy the right...to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.
>
> U.S. Const. Amend. VI

In our system of justice, lawyers are necessities, not luxuries, critical to insuring a fair trial. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). The accused in a

criminal case:

> ...requires the guiding hand of counsel *at every step of the proceedings* against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.
>
> *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (emphasis supplied).

The right to counsel has "long been recognized as the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). The very purpose of the Sixth Amendment right is to ensure "assistance" for the accused when confronted with the "intricacies of the law and the advocacy of the public prosecutor." *United States v. Ash*, 413 U.S. 300, 309 (1973). To hold otherwise "could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." *Avery v. Alabama*, 308 U.S. 444, 446 (1940).

B. This Court has established different rules for analyzing Sixth Amendment claims, depending upon whether counsel is completely denied, constructively denied, or counsel commits specific errors in representation.

This Court has employed different tests to determine whether the right to counsel is violated in a criminal case; some of which require a defendant to demonstrate prejudice arising from the violation in order to obtain relief, others not. The court has "uniformly found con-

stitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *U.S. v. Cronic*, 466 U.S. at 659 n. 25 (1984). On the other hand, in cases where an actively participating attorney commits specific errors, the Court "require[s] the defendant to demonstrate that the errors actually had an adverse effect on the defense." *Roe v. Flores-Ortega*, 528 U.S. 470, 482 (2000). Where specific failures of performance are the focus of a Sixth Amendment claim, *Strickland v. Washington*, 466 U.S. 668, 687 (1984), establishes a rule requiring a defendant to prove both (1) deficient performance and (2) prejudice from the deficient performance to establish a Sixth Amendment claim.

There is another category of cases, where, although a person who happens to be a lawyer is present at trial (or is supposed to be) with the accused, the putative lawyer engages in absolutely no advocacy on behalf of the accused. In these cases, prejudice is presumed as in the cases involving complete denial of counsel. This Court established the rule for evaluating *constructive* denial of counsel in *United States v. Cronic*:

> The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary system itself presumptively unreliable.

Cronic, 466 U.S. at 659

This presumption follows from the fact that lawyers in criminal cases are necessities, they are the means through which the other rights of the person on trial are secured. *Id.* at 653. The very premise of our adversary system is that partisan activity on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. *Herring v. New York*, 422 U.S. 853, 862 (1975); *Cronic*, 466 U.S. at 655. The adversarial process thus requires a defendant to have counsel acting in the role of an advocate. *Anders v. California*, 386 U.S. 738, 743 (1967); *Cronic*, 466 U.S. at 656. Because counsel's *assistance* is essential, a trial is unfair if the accused is constructively denied counsel at a critical stage. *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000).

Thus the rule of *Cronic* can be succinctly stated as follows: when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing at a critical stage of a criminal trial, the Sixth Amendment is violated, and prejudice is presumed.

Petitioner takes issue with *Cronic* and baldly assets in his brief that prejudice may only be presumed when (1) there is a complete denial of counsel; (2) the government interferes with the right to counsel; or (3) counsel labors under an actual conflict of interest. (Petitioner's Brief p. 36). Petitioner posits that "Bad lawyering, no matter how bad, does not justify invoking a *per se* presumption under *Cronic*." (Petitioner's Brief p. 37) Petitioner urges this Court to apply the *Strickland* attorney error test in all Sixth Amendment cases where an attorney is present with the defendant.

Yet *Strickland* itself acknowledges that prejudice should be presumed if counsel is constructively denied; and cites *Cronic* as authority for that proposition:

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. *See United States v. Cronic*, 466 U.S. at 659, and n. 25.
>
> *Strickland*, 466 U.S. at 692

Petitioner wholly ignores *Cronic's* language that "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Cronic* 466 U.S. at 659. This language plainly contemplates presuming prejudice in cases where an attorney is present on the defendant's behalf at the trial, but engages in no advocacy.

Petitioner's proposed rule also proves too much. He suggests that there is nothing so outrageous, so deplorable, so contrary to a client's interest that an attorney can do or fail to do that would warrant a presumption of prejudice. Under petitioner's rule, if an attorney stood up in closing argument at the penalty phase of a capital trial and told the jury that they should vote to execute a client because he's a despicable monster that deserves to die, prejudice would not be presumed.[12] The state courts in such a case under petitioner's rule would be free to find that the prosecution's penalty phase case was so overwhelming, it wouldn't have made a difference if the lawyer actually advocated

[12] Such a hypothetical is not that far-fetched. *See, eg. Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997) (Counsel ineffective and prejudice presumed under *Cronic* in death penalty proceedings where lawyer calls his client abnormal, crazed and dangerous psychiatric case who acted like a bull).

for the defendant. Likewise, if counsel comes to trial intoxicated, or sleeps through the proceedings,[13] under petitioner's proposed rule, there would be no constitutional foul unless the defendant could show counsel's being awake and sober would have made a difference.

Given that prejudice is presumed when the accused is afforded no lawyer, *Cronic* simply requires prejudice also to be presumed in that rare case where the accused's lawyer is so bad that it is fundamentally equivalent to having no lawyer. The policy justifications for presuming prejudice when no lawyer is afforded a defendant, are equally present if a person who happens to be a lawyer is appointed, but does nothing that could be construed as advocacy. In either case, the verdict is unreliable, because the evidence presented by the prosecution has not been tested by cross examination, countervailing proof, and countervailing argument. Thus the verdict bears no indicia of reliability. Cases involving constructive denial of counsel are altogether different than cases where an attorney is acting as an advocate, but makes some specific error. In the latter instances, counsel's overall advocacy provides some assurance that the verdict is reliable, and in such cases it makes sense to examine whether a specific failure of counsel likely affected the outcome of the trial. Yet where no advocacy occurs, it is just as if there is no counsel at all. In an adversarial system, there must be two adversaries testing the case in order to be sure of the reliability of the verdict. If there is no adversary arguing one side of a case, the Court assumes the absence of an adversary taints the fairness and reliability of the proceeding.

In *Powell v. Alabama*, this Court reversed the convic-

[13] *See, eg. Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (cert. pending) (lawyer slept through substantial portions of capital murder trial).

tion of six African Americans accused of raping two white girls (a capital offense) near Scottsboro, Alabama. *Powell v. Alabama*, 287 U.S. 45 (1932). The trial judge had appointed all members of the bar to arraign the defendants. Whether the whole bar would continue to represent the defendants was not clear. *Id.* at 56. On the day of the trial, a lawyer from Tennessee appeared on behalf of persons interested in the defendants, but stated he had not sufficient time to prepare the case or to familiarize himself with local procedure. *Id.* at 57. The Alabama trial court resolved the problem by appointing the Tennessee lawyer to be assisted by whatever help the local bar could provide. *Id.* at 57-58. In *Powell*, this Court noted that:

> [D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.
>
> *Powell*, 287 U.S. at 57.

In *Powell*, the Court granted *Sixth Amendment* relief when several counsel were in fact appointed, and no showing of prejudice was demonstrated. All the state's witnesses were subjected to rigorous cross examination by trial counsel. *Powell*, 287 U.S. at 75 (Butler dissenting). The collective defense attorneys prepared and submitted motions for change of venue, and called witnesses to support the motion. *Id.* The dissent also notes that there was ample evidence to support a conviction since while each defendant asserted his own innocence, each

testified he saw the others accused commit the crime charged. *Id.* at 75-76.

Powell is instructive since a Sixth Amendment violation occurred notwithstanding the physical presence of counsel. *Powell* refutes Petitioner's claim that bad lawyering, no matter how bad, never results in a presumption of prejudice.

C. When a lawyer abandons his duty to present a case for life in the penalty phase of a capital trial, the rule of *Cronic* applies.

The United States Court of Appeals for the Sixth Circuit applied the rule of *Cronic* in Gary Cone's Case due to counsel's total failure to mount a defense to the prosecution's penalty phase case for death:

> Essentially, Cone did not have counsel during the sentencing phase of his trial and thus the prosecutor's insistence that justice required that Cone be put to death was not subjected to "meaningful adversarial testing." *Cronic*, 466 U.S. at 656. We find that counsel's abandonment of Cone at possibly the most "critical stage of his trial" fell below an objective standard of reasonableness and prejudiced him, which resulted in the ineffective assistance of counsel under the Sixth Amendment.
>
> (Pet. App. 37)

When a lawyer representing a capital defendant sits idly by as the state presents aggravating proof supporting a death sentence, fails to present mitigation proof, then waives closing argument after the prosecution argues the (unrefuted) proof demands a death verdict, the attorney inescapably leaves the jury with the

impression that the prosecution's case is overwhelming, irrefutable, and the defendant deserves death. The penalty phase of a capital trial is the most critical stage of the proceeding. Counsel's failure to mount some case for life during the penalty phase, in response to the prosecution's proof and argument for death constitutes a total failure to subject the prosecution's case to meaningful adversarial testing, requiring application of the *Cronic* rule.

1. *In a capital sentencing proceeding, the lawyer must make a case for life.*

At the penalty phase of a capital trial, the sole issue to be resolved is whether the defendant should be sentenced to death or life imprisonment. The defense attorney must marshal all available evidence to counter the state's case for death, and affirmatively present the jury with reasons they should vote for the defendant's life to be spared. Admissible evidence encompasses any fact which a juror might find supports a sentence less than death, including facts pertinent to the defendant's background, upbringing, life experience, and mental illness which may not rise to the level of an insanity defense. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 113-115 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986). The scope of relevant proof is therefore much broader than that which is relevant to the issues at the guilt/innocence phase. The essence of defense counsel's role in a capital sentencing proceeding is to individualize and humanize the defendant - to help the sentencer grasp an intelligible picture of the defendant as a person who is more than just the perpetrator of a murder. The lawyer must advocate his client is a human being with a unique personal history of experiences, attributes, even frailties, that

add up to a life worth sparing in the exercise of reasoned moral judgment. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989).

Since Tennessee is a "weighing state" the jury is instructed that if it finds the presence of at least one aggravating circumstance, it must weigh these circumstances against mitigation circumstances present to determine whether the defendant should be sentenced to death. (J.A. 57) "As an advocate for life, counsel must attempt to demonstrate that mitigating factors outweigh aggravating factors and must present the sentencer with the most persuasive possible case for mercy." Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 318 (1983). This is because "[a]fter considering all the gruesome evidence in the guilt/innocence phase, the jury probably will need no additional reasons to impose the death penalty.... Obviously, if the defendant has mitigating factors in his or her behalf, these must be advanced and sold to the jury." Tennessee Association of Criminal Defense Lawyers, *Tools for the Ultimate Trial*: The TACDL Death Penalty Defense Manual, 10-5 (1985).

Death is never a foregone conclusion in a capital case, no matter how ugly the murder. A prime example would be the Tennessee cases of *Groseclose v. Bell*, 130 F.3d 1161 (6th Cir. 1997), and *Rickman v. Bell*, 131 F.2d 1150 (6th Cir. 1997). William Groseclose hired Ronald Rickman to kill his wife. Rickman and an accomplice abducted Deborah Groseclose, raped, strangled and stabbed her. Then they stuffed her in the trunk of a car and left her to die in the Memphis summer heat. Counsel for both Groseclose and Rickman were deplorable. Ronald Rickman's attorney portrayed his client to the jury as an abnormal, crazed and dangerous

psychiatric case, and even referred to him as a bull. *Rickman*, 131 F.3d at 1158-1159. Groseclose's lawyer also failed to mount any defense, and abdicated his case to the lead of Rickman's counsel, who was hostile to his own client. *Groseclose*, 130 F.3d at 1169-1170. The jury sentenced them to death. Both defendants were afforded habeas relief in federal court. With new counsel, both Groseclose and Rickman received a life sentence, despite the heinous facts of the case. Death is thus never a certain outcome in a capital case, because juries are weighing more than the facts of the case - they are considering a multitude of facts, including the defendant's background, life experience, and circumstances to arrive at a reasoned moral decision about sentence.[14]

2. Dice failed to present a case for Gary Cone's Life

Structurally, Gary Cone's penalty phase trial proceeded as follows: The prosecution made a brief opening statement, followed by Dice's brief opening statement. (J.A. 20-27) The prosecution then put forth proof of aggravating circumstances, and the defense put forth no proof of mitigating circumstances. The prosecution then argued that the law and proof the jury heard required

14 Tennessee juries have often sentenced defendants to life after a capital sentencing proceeding, even though the cases involved horrible facts. *See, e.g. State v. Thompson*, 2001 W.L. 912715 (Tenn. Crim. App. 2001) (Two high ranking gang members while incarcerated ordered "hit" on correctional officer who was executed in front of his home: each sentenced to life without parole and life respectively); *Cox v. State*, 880 S.W. 2d 713 (Tenn. Crim. App. 1994) (two women and their mother were murdered by defendant's beating them with a skillet and stabbing them with a knife: defendant sentenced to life); *State v. Bibbs*, 806 S.W. 2d 786 (Tenn. Crim. App. 1991) (eleven year old girl who threatened to tell her mother about sexual advances by a hotel security guard was brutally beaten by the guard and then thrown off the hotel balcony to her death: defendant sentenced to life).

Gary Cone to be sentenced to death, (J.A. 50-52) and the defense waived closing argument. (J.A. 52)

Dice presented absolutely no defense before the jury to the prosecution's case for death. The prosecution's case for death was not countered with any mitigation proof for life. The prosecutor in making his closing argument asked the jury to impose death as punishment, arguing it was required by the aggravating circumstances in Cone's case. After the prosecutor made his closing argument seeking death, John Dice stood up before the jury and stated "Defense waives final argument, your Honor." (J.A. 52) This failure to answer and contest the prosecution's argument for death is bound to have been construed by the jury as signifying at least "I have no good reply for that," or "I am at a loss for any reason why a death sentence should not be imposed." The jury was implicitly told by Dice's silence that whatever Dice might have said prior to the state's proof at sentencing - now that he's heard it - it is irrefutable.

Dice's failure to present a case for life spelled doom for Gary Cone in light of Tennessee's jury instructions about weighing aggravating and mitigating circumstances:

> If you unanimously determine that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the State, beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death.
>
> (J.A. 57)

By failing to present a case for life, the jury was left with the impression that even defense counsel believed they had no choice but to impose death since there was no countervailing case for life to weigh. The combined

effect of mustering no evidence and making no argument to counter the state's case for death signaled resignation to a foregone conclusion that no case for life could be made. To the jury uneducated in the law, the statement that "the defense waives final argument" necessarily implies that there must be nothing good in response for the lawyer to say. Dice's silence after the prosecution's case implied to the jury that Dice was in agreement with the prosecutor. In a weighing state, this failure amounted to a concession that there was no mitigation to present. Counsel thus entirely failed to subject the prosecution's penalty phase case to meaningful adversarial testing.

Though it was mentioned by Dice in his guilt/innocence phase opening statement, Dice never developed the effects on Cone of seeing his dead brother being retrieved from a lake at age 8. (J.A. 102) (R4, Add. 2, Doc. 1, Tr. p. 94) The effects of Gary Cone's fiancé being raped and murdered in 1972 were not developed before the jury. (J.A. 102) Most importantly, Dice never developed proof about Gary Cone's receiving a Bronze Star for his heroic service in the Vietnam War, or explained why Cone received a Bronze Star, or even what a Bronze Star is. This failure is inexplicable in light of Dice's admitted knowledge about the Bronze Star decoration and its significance. (R4, Add. 2, Doc. 1, Tr. p. 158) (Dice would have "given his right arm" for a Bronze Star decoration).

In *Herring v. New York*, this Court addressed the crucial importance of closing argument in a criminal case. *Herring*, 422 U.S. 853 (1975). In that case New York enacted legislation allowing a trial court to deny closing argument to a defendant in a non-jury criminal trial. *Id.*

In discussing the case, this Court noted that closing argument "serves to sharpen and clarify the issues for

resolution by the trier of fact in a criminal case." *Id.* at 862. The lawyer's ability to respond *after* evidence has been presented marks a critical facet of the closing argument:

> For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.
>
> *Id.*

The Court emphasized that "no aspect of such advocacy could be more important than the opportunity finally to marshal evidence for each side before submission of the case to judgment." *Id.* The Court then held that the New York Statute violated the defendant's Sixth Amendment right to counsel. *Id.* at 865.

Herring highlights why Dice's failure to advocate for Gary Cone's life in closing is so devastating. Only after the prosecution's case for death is presented can it be rebutted. Only after all the proof of aggravation and mitigation (if it had been presented) are before the jury can the evidence be marshaled to demonstrate why, based upon the facts admitted in evidence, Gary Cone should be allowed to live. Closing argument is an essential tool for the trial lawyer. Abandoning this tool left the jury with no guidance as to why the law could allow Gary Cone to be given life.

The jury was not provided a coherent case demonstrating why reasoned moral judgment called for a

sentence of life and not death - leading to the inescapable conclusion that there was none. As the Sixth Circuit stated:

> We can only imagine the effect on the jurors when Cone's defense counsel refused even to ask them to spare his client's life. They could only have inferred that Cone's counsel was, by his silence, acquiescing to the prosecutor's plea that Cone be sentenced to death... Cone may well have fared better if his counsel had left the courtroom entirely for the sentencing phase of the trial. If that had occurred, the jurors could not have inferred, as indeed they must have, that counsel's knowing and purposeful silence was an implicit agreement that justice required that Cone be put to death. When a man faces the gallows and his attorney sitting next to him declines even to ask the jurors to spare his life in the name of simple mercy, the attorney ought to have a most compelling reason for failing to speak - one that would incline a reasonable observer to credit as a sentencing strategy that is legally and factually justified. The reasons Cone's counsel has given are totally unreasonable, given the stakes. This was not strategic representation; it was non-representation of the most deadly sort.
>
> (Pet. App. 36)

3. *Dice's post hoc justifications for his failure to present a case for life are convoluted and confusing.*

John Dice testified in post conviction that he presented his mental health mitigation evidence in the guilt/innocence phase of the trial. Yet Dice never explained to the jury why - factually, morally, and legally- the mental health evidence which the jury had just

found insufficient to support a defense of insanity should nonetheless justify a life sentence in the penalty phase. Also, it is well documented that evidence of mental illness is a potential "two edged sword."[15] Without proper guidance from counsel, many jurors regard mental illness as an aggravating circumstance rather than a mitigating one.[16] By adopting a strategy to put forth mental health mitigation proof solely in the guilt phase of the trial (J.A. 84), counsel was limiting the jury to considering proof that was only relevant to the guilt phase issues of insanity. Though proof with respect to Gary Cone's drug dependence and post traumatic stress disorder arising from Vietnam is potentially mitigating, it by no means encompasses all mitigating proof that could be pre-

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[15] *Penry v. Lynaugh*, 492 U.S. 302, 324 (1989) ("Penry's mental retardation and history of abuse is thus a two edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future").

[16] [A] jury, having sat through a trial and struggled in the guilt/innocence phase, often is left with the impression that there is nothing about serious mental illness, by itself, that should be considered at the penalty phase as determining that the defendant should not be executed. The language used in jury instructions at this phase of a capital trial further adds to juror confusion. Terms such as "aggravating factors" and "mitigating factors" remain unexplained and are unfamiliar to many jurors. Studies have been shown that many jurors erroneously believe that mental illness is a reason for imposing a death sentence–i.e., that "mitigating" actually means "aggravating." "This error can easily occur because it is never explicitly explained to the jury that serious mental illness, if found, should normally be weighed against death." Dorean Marguerite Koenig, *Mentally Ill Defendants: Systemic Bias in Capital Cases*, 28 Human Rights 10, 11 (Summer 2001).

sented in his case.[17] Dice knew the proof in the record was limited in scope, since the prosecution objected during the guilt/innocence phase to the relevancy of testimony about Gary Cone's military service. (J.A. 63-64) But Dice never followed through by developing this mitigating evidence in the penalty phase . *Id.*

Dice also testified that the reason he did not call any witnesses to establish mitigating proof in the penalty phase was his concern that he would be opening the door to emphasize other prior bad acts. (R4, Add. 2, Doc. 1, Tr. pp. 104-105, 137) This testimony demonstrates his lack of understanding of mitigating evidence. Under Tennessee law, witnesses who would testify as to Gary Cone's traumatic childhood and horrible Vietnam experience would not have "opened the door" to cross examination about other prior bad acts. In *Cozzolino v. State*, 584 S.W. 2d 765 (Tenn. 1979), the Tennessee Supreme Court opined that only evidence relevant to an aggravating circumstance or mitigating factor raised by defendant is admissible in the punishment phase of a capital trial. *Id* at 767-768. The court held in *Cozzolino*

[17] This proof was also tainted by prosecutorial misconduct at the guilt phase closing argument, wherein the prosecution improperly argued Gary Cone did not have a drug problem, but rather, was a drug dealer, based upon a substantial amount of money found in Gary Cone's automobile at the scene of the crime. The post conviction court found that the prosecution should not have so argued, since the prosecutor knew the money in the car was robbery proceeds, not drug sale proceeds (J.A. 81), but the court ruled the error harmless as a substantive claim for relief. However, this improper taint of the guilt phase proof of Cone's drug induced amphetamine psychosis made the failure to admit proof of drug addiction at sentencing all the more important. The jury was presented with improper argument in the guilt phase closing that Cone did not at all use drugs. Dice never even attempted to correct the jury's tainted impression, which made any guilt phase proof of little value as mitigation evidence.

that defendant's proof of his troubled childhood introduced in an attempt to show the origin of his criminal acts does not open the door to the state to introduce proof concerning present criminal proclivities. *Id.* Thus the law was clear at the time of Gary Cone's trial that introduction of mitigation evidence as to Cone's background would not have opened the door for cross examination as to Gary Cone's other previously unmentioned bad acts. Either Dice did not know the law, or he was striving in his testimony to find some justification for his failure to present mitigation evidence.

Dice also testified incredibly that his "strategy" was to remain silent while the prosecution argued for an aggravating circumstance which Dice knew was not supported by the evidence. Dice's plan was to get the jury to find an aggravating circumstance not supported by the evidence and have his case reversed by the appellate courts. (R4, Add. 2, Doc. 1, Tr. pp. 107-109)[18] Any lawyer who would knowingly fail to refute an aggravating circumstance which is not supported by the evidence, in hopes of a future reversal is acting objectively unreasonably. In essence, Dice sought to concede a death verdict in hopes of a reversal on appeal. Such a strategy amounts simply to a total abdication of advocacy.

4. *Petitioner's arguments that Dice engaged in advocacy during the penalty phase have no merit in light of Dice's failure to make a case for life before the jury.*

Petitioner's brief raises four points in arguing that Dice engaged in some advocacy during the penalty

[18] It should be noted that Dice even did a poor job of implementing this bizarre strategy, since he did not object to the jury instructions for the objectionable aggravating circumstance.

phase of the trial. Petitioner points out that:

- Mitigation evidence of drug addiction and Vietnam Veterans Syndrome was developed in the guilt phase.
- Dice made an opening argument in the penalty phase asking for mercy, and asking the jury to recall the guilt phase testimony of Gary Cone's mental health problems.
- Dice solicited on cross examination of a penalty phase witness that court records refer to Gary Cone having been awarded the Bronze Star for his military service in Vietnam.
- Dice successfully objected and excluded from evidence two gruesome photographs of the deceased victims.

Petitioner argues that the above four points refute Cone's contention that Cone's case was not subjected to meaningful adversarial testing at the penalty phase. Yet the above points are irrelevant to Cone's argument that Dice failed to make a case for life. Putting oneself in the position of Gary Cone's jury, the jury was told it must decide whether Cone should live or die by weighing aggravating and mitigating proof. After the prosecution put forward aggravating proof, the defense rested in front of the jury. The prosecution then made a closing argument informing the jury that the state had proven aggravating circumstances, and the law required a sentence of death - to which defense counsel failed to respond. The jury was inescapably left with the impression that - now that defense counsel has heard the state's case, there is nothing to say to refute it. Therefore the fact that Dice put forth some possible mit-

igation proof in the guilt phase,[19] or made an opening statement is irrelevant, since this occurred before the prosecution's penalty phase case and could not in any way counter the jury's impression that no case for life existed. In the same way, the objection to the photographs, which occurred completely outside the jury's presence (J.A. 41), could have in no way countered the jury's impression that no case for life existed. The jury had no idea John Dice was interposing an objection.[20] The Bronze Star reference was elicited on cross examination of the state's penalty phase witness (J.A. 30-31). Yet John Dice did not admit this proof, rather the proof was admitted by the state. The reference is also worthless as mitigation proof without some argument to the jury or some testimony indicating what a Bronze Star is, or why it is mitigating.

None of the reasons offered by petitioner change the fact that the jury heard no case for life - rather they heard counsel concede to the prosecution's case for death.

5. *This Court's precedents do not justify applying Strickland rather than Cronic in a case where a lawyer utterly failed to make a case for life in the penalty phase of a capital trial.*

This Court has not until now considered a case where a lawyer is physically present during the penalty phase of a capital trial but fails to contest the prosecution's

---

[19] As discussed *supra*, the jury could just as easily have interpreted the guilt phase proof that Cone was a crazed drug addict as an aggravating circumstance. Also, counsel's failure to clear up the taint of the prosecution's improper argument that Gary Cone was not a drug user, rendered the guilt phase proof of little value as mitigation evidence.

[20] Dice simply asked to approach the bench, and the jury was then excused before the objection was argued. (J.A. 41)

case for death and muster some case for life. Petitioner cites several post-*Strickland* cases which he argues are analogous to the present case and warrant applying the *Strickland* test to Cone's case. But all the cases cited by Petitioner involve "specific errors and omissions...[as] the focus of a claim of ineffective assistance" on the part of a lawyer who was otherwise engaged and active as an advocate throughout the sentencing proceeding. *U.S. v. Cronic*, 466 U.S. at 657 n. 20. None of this Court's previous *Strickland* cases involved a lawyer who failed to present mitigation proof and waived closing argument in a capital sentencing proceeding. Gary Cone's case presents this Court with a far more pervasive abdication of advocacy than in this Court's previous *Strickland* cases, and is thus distinguishable from those cases referenced by Petitioner in which this Court applied a *Strickland* prejudice analysis to the penalty phase of a capital trial.

In *Strickland v. Washington*, petitioner claimed trial counsel to be ineffective during the penalty phase of a capital trial by failing to request a pre-sentence report, failing to introduce a psychiatric report, and failing to investigate and present character witnesses. *Strickland*, 466 U.S. at 675. Trial counsel made a closing argument presenting to the court his client's remorse and acceptance of responsibility by turning himself in as the perpetrator of a previously unsolved crime that had been erroneously ruled an accident. *Id.* at 673. Counsel argued that his client had no history of criminal activity, and that his crimes were committed under the extreme mental or emotional disturbance. *Id.* at 673-674. He further argued that his client should be spared death because he offered to testify against a co-defendant, and he was a fundamentally good person who had briefly gone badly wrong in extremely stressful circumstances. *Id.* at 674. Counsel

provided a plausible reason for choosing not to request a pre-sentence report, since it would contain his client's extensive record, which he had successfully moved to exclude from evidence. *Id.* at 673. These facts differ qualitatively from the penalty phase in Gary Cone's case where the jury heard no argument after the prosecution's case as to why Gary Cone's life should be spared.

Darden v. Wainwright, also involved allegations of specific attorney error in the penalty phase. *Darden*, 477 U.S. 168 (1986). In *Darden*, defense counsel made a closing argument asking for mercy; and counsel put his client on the stand in the penalty phase to testify. *Darden*, 477 U.S. at 182, 186. *Darden* did not even address the question of whether prejudice had to be proven, since the court found counsel's performance reasonable. *Id.* at 187.

In *Burger v. Kemp*, 483 U.S. 776 (1987), this Court was confronted with a case raising ineffective assistance of counsel for failure to present evidence in the penalty phase of the trial. *Burger*, 483 U.S. at 788. Yet in *Burger* there is no claim that counsel failed to make a closing argument, a fact critically different than in Gary Cone's case. Furthermore, the *Burger* Court never addressed the issue of prejudice, since this Court found that counsel's performance was not deficient. *Id.* at 795-796.

This Court's latest case concerning ineffective assistance of counsel at the penalty phase, *Williams v. Taylor*, raised claims of trial counsel's failure to investigate and develop proof of mitigating evidence of childhood abuse, borderline retardation, and positive behavior in prison. *Williams v. Taylor*, 529 U.S. 362, 395-396 (2000) Unlike Cone's case, trial counsel in *Williams* presented penalty phase proof, including the testimony of Williams' mother, two neighbors, and psychiatric proof. *Id.* at 369. Williams' counsel made a closing argument

asking the jury to consider the fact that Williams turned himself in, and admitting his involvement in four crimes that otherwise would not have been solved. *Id.*

Petitioner also cites two Sixth Amendment cases concerning the failings of counsel on appeal, both of which are distinguishable. In *Smith v. Robbins*, an appointed attorney representing a second degree murder defendant on appeal concluded there were no non-frivolous issues to pursue in the appellate courts. *Smith v. Robbins*, 528 U.S. 259, 267 (2000). The attorney filed with the California Court of Appeals a non-merits brief that complied with applicable California law. The main issue before this Court was whether the California Rule was constitutional which instructed counsel how to proceed on appeal if counsel believed all appellate issues would be frivolous. The holding in *Robbins* dictates that the California procedure does not deny criminal appellants the right to counsel. *Robbins*, 528 U.S. at 276. The Court then indicated there was still an issue in the case as to whether the attorney erred in finding all potential appellate issues frivolous, and remanded the case with instructions to analyze the attorney's performance under *Strickland*. *Robbins* is distinguishable from Gary Cone's case since *Robbins* had an active attorney who searched the record for meritorious issues on appeal, and upon finding none filed a non-merits brief that complied with California law. The attorney thus actively pursued his client's interest. While it is conceivable that an appellate attorney in a typical felony case may find no non-frivolous issues to appeal, it is not conceivable that a capital defense attorney can make no case for the client's life in the penalty phase. The appellate attorney who reviews the record and finds no meritorious issues on appeal due to exemplary trial representation, does not abandon all advocacy by complying with state law

and informing the court of these facts. After all, a defendant has no constitutional right to present frivolous issues for appellate review. Rather, such actions would demonstrate a conscientious attorney, aware of her obligation not to present the court with frivolous issues.

On the other hand, there is no professionally acceptable reason to fail to make a case for life in the penalty phase, even if the case at a minimum focuses on asking the jury for simple mercy. *Robbins* is thus distinguishable since the appellate attorney in *Robbins* did not abandon advocacy, even though he filed a non-merits brief, whereas Gary Cone's attorney did abandon advocacy in the penalty phase.

In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), this Court considered how to evaluate a claim of ineffective assistance of counsel for failure to file a notice of appeal. The facts in this case are somewhat peculiar, since the defendant pleaded guilty to second degree murder, then claimed his counsel was ineffective for not filing a notice of appeal. *Roe*, 528 U.S. at 473-474. The primary thrust of the *Roe* opinion was to reject the Ninth Circuit's bright line rule that the Constitution required counsel in a criminal case always either (1) to file a notice of appeal, or (2) to discuss the possibility of appeal with the defendant. *Id.* at 478 The Court noted that in such circumstances as a guilty plea, it is difficult to say counsel acted professionally unreasonably by not consulting with the client about an appeal. *Id.* at 479.

Interestingly, *Roe* held that the *Strickland* test governs counsel's failure to file a notice of appeal, but the Court adopted an unusual rule for "prejudice." One would think the test for prejudice resulting from failure to file a notice of appeal would be whether there were any non-frivolous issues available to appeal. Yet the Court remarkably held that prejudice in this case is

whether, had the defendant known of his right to appeal, he would have taken it:

> Accordingly, we hold that, to show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed.
>
> *Roe*, 470 U.S. at 484

Though the Court states it applied a *Strickland* test, the test enunciated looks far more like a *per se* presumption of prejudice than a *Strickland* type analysis. After all, in order for there to be deficient performance, the attorney has to fail to file a notice of appeal (1) against the client's express wishes, or (2) when it is obvious that a client would want to appeal. Demonstrating the improper failure to file the notice of appeal (i.e. deficient performance) almost necessarily demonstrates *Roe* prejudice. If one applied the *Roe* prejudice test to Gary Cone's case, the analysis would be whether Gary Cone, had he known his lawyer was planning to fail to make a case for his life by not presenting proof and not making a closing argument, would Cone have consented to these tactics. Under the *Roe* test Gary Cone has proven prejudice since (1) he was not consulted by Dice with regard to failing to make a case for life, and (2) no reasonable grounds exist for failing to make a case for life in the penalty phase of a capital case.

Roe also did not involve a total abdication of advocacy. Recall that the issue in *Roe* centered around an attorney who failed to file a notice of appeal following the defendant's guilty plea. As this Court stated, it is not necessarily professionally unreasonable to fail to consult with a client about an appeal following a guilty plea. One could reasonably expect that the guilty plea concluded

the case. Granted, there are some cases where failing to file a notice of appeal could be a total abdication of advocacy, such as the failure to file a notice of appeal after a capital trial where the defendant has been sentenced to death - but those facts were not before the Court in *Roe*.

Finally, *Roe* reaffirms the rule of *Cronic* that prejudice will be presumed if there is a *constructive* denial of counsel:

> In some cases, however, the defendant alleges not that counsel made specific errors in the course of representation, but rather that during the judicial proceeding he was - either actually *or constructively*-denied the assistance of counsel altogether. "The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage." *Cronic*, *supra*, at 659... Under such circumstances, "[n]o specific showing of prejudice [is] required" because "the adversary process itself [is] presumptively unreliable." *Cronic*, *supra*, at 659.
>
> *Roe*, 528 U.S. at 483 (emphasis supplied)

Gary Cone's case presents a defense attorney who ceased to function as an advocate at the sentencing hearing. The jury never heard why the mental health evidence they had just found insufficient to support a defense of amphetamine psychosis nonetheless could count as mitigation and justify a life sentence. No coherent argument to save Gary Cone's life was presented to the jury, discussing his service to his country. The jury was left with an impression that defense counsel simply was at a loss to respond to the state's case for death. Gary Cone's sentencing hearing thus was qualitatively different than the cases cited by petitioner.

III. IF THE COURT CONCLUDES THAT THE SIXTH CIRCUIT ERRED IN GRANTING HABEAS RELIEF UNDER *CRONIC*, IT SHOULD REMAND THIS CASE TO THE COURT OF APPEALS FOR CONSIDERATION OF GARY CONE'S SIXTH AMENDMENT CLAIMS UNDER *STRICKLAND*.

Because the Sixth Circuit resolved Cone's ineffective assistance of counsel claims by relying upon *Cronic*, it was unnecessary for that court to consider how Cone's ineffective assistance of counsel claims should be resolved under the two-pronged test of *Strickland v. Washington*. This Court does not ordinarily pass upon questions that were not considered and decided by the lower courts. *See*, e.g. *Gilbert v. Homar*, 520 U.S. 924, 935-936 (1997); *Wright v. West*, 505 U.S. 277, 297 (1992). If therefore, this Court concludes that *Strickland* provides the Sixth Amendment rule applicable to Cone's circumstances, it should remand this case to the Sixth Circuit to apply *Strickland's* two pronged test to the record facts.

Such a disposition would be required by Supreme Court Rule 14.1(a) which states "Only the questions set out in the petition [for certiorari], or fairly included therein, will be considered by the Court." The certiorari petition here raised solely the questions (1) whether the Court of Appeals had improperly applied a *de novo* standard of review in alleged contravention of 28 U.S.C. §2254(d), and (2) whether the Court of Appeals had improperly bypassed the rules of *Strickland* by deciding Cone's Sixth Amendment claim under *Cronic*. No question of the proper application of *Strickland* itself to the facts of this record is subsumed in either of these questions presented.

There are additional reasons why a remand to the Sixth Circuit to apply *Strickland* to the facts in this case

is particularly appropriate if Cone's ineffective assistance of counsel claim is not resolved in his favor under *Cronic*. First of all, in analyzing Cone's ineffective assistance of counsel claim under *Strickland*, the District Court below used an incorrect legal standard. The District Court took the view that *Lockhart v. Fretwell*, 506 U.S. 364 (1993) had qualified *Strickland* - precisely the same error that the Supreme Court of Virginia made in the (Terry) *Williams* case (Pet. App. 78-80):

> "Thus an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was found fundamentally unfair, or unreliable, is defective." *Fretwell*, 506 U.S. at 369.
>
> (Pet. App. 79)

In *Williams v. Taylor*, this Court held the Virginia Supreme Court's decision was contrary to clearly established federal law "to the extent that it held that our decision in *Lockhart v. Fretwell*....somehow modified or supplanted the rule set forth in *Strickland*." *Williams*, 529 U.S. at 413. The Virginia Supreme Court's decision was contrary to *Strickland* because the Virginia Court also required a showing that the result of the criminal proceeding was fundamentally unfair or unreliable. *Williams* 529 U.S. at 414.

Dissenting in *Williams*, the Chief Justice noted that the Virginia Supreme Court did also inquire into whether *Williams* had demonstrated prejudice under *Strickland* and found none. *Williams*, 529 U.S. 417-418. But, as Justice O'Connor notes in her opinion:

> It is impossible to determine, however, the extent to which the Virginia Supreme Court's error with respect to its reading of *Lockhart* affected its ultimate finding that *Williams* suffered no prejudice.
>
> *Williams* 529 U.S. at 414 (O'Connor concurring)

Thus, even though the Virginia Court arguably analyzed Williams' claims under *Strickland* as well, a remand was necessary for consideration under the proper rule. The same rationale applies in this case. The Sixth Circuit never addressed the District Court's erroneous application of *Fretwell* since the Sixth Circuit decided this case under *Cronic*. The District Court's flawed *Strickland* analysis of Cone's ineffective assistance of counsel claim should be subjected to appellate review, and the Court of Appeals is the proper forum to conduct such review in the first instance. *Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991).

The District Court also took the view that federal habeas analysis of Cone's Sixth Amendment claim was limited to counsel's failing to present or argue the mitigating evidence which trial counsel had in hand. (Pet. App. 55-64, 79) This restriction was based upon a holding that Cone's complaint of counsel's inadequate investigation of mitigating circumstances was procedurally defaulted. (Pet. App. 79)[21] The procedural default ruling was in turn based upon a finding that the Tennessee courts had invoked an adequate and independent state ground when they dismissed an ineffective assistance claim including allegations of inadequate investigation

[21] *See e.g.*, R71, Petition for Writ of Habeas Corpus, ¶40a (failure of counsel to investigate Cone's background) ¶40b (failure of counsel to secure adequate expert assistance), ¶40d, ¶40e, ¶40f, ¶40n, ¶40oo.

of mitigating circumstances, presented in Cone's second state post conviction petition, on the theory that such a claim had been "previously determined" in Cone's first post conviction proceeding. The state court in ruling upon Cone's first post conviction petition rejected an ineffective assistance claim that did not include allegations of inadequate investigation. *Cone v. State*, 927 S.W. 2d 579, 581-582 (Tenn. Cr. App. 1995). (Pet. App. 55-62)

Both in the state courts and in the federal courts below, Cone argued that preclusion of the inadequate investigation components of his ineffective assistance of counsel claim was not based upon an adequate and independent state ground because it was only in Cone's own case that the Tennessee Courts first construed the "previously determined" clause of the applicable Tennessee post conviction statute[22] as applying to previously unraised aspects of a general claim previously raised in other aspects. *Cone v. State*, 927 S.W.2d 579, 581-582 (Tenn. Crim. App. 1995). This construction was therefore not firmly established at the time it was applied to Cone. *Ford v. Georgia*, 498 U.S. 411, 425 (1991). "Novelty in procedural requirements cannot be permitted to thwart review in ...[federal court] applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *Id.* at 423, quoting *N.A.A.C.P. v. Alabama ex rel Patterson*, 357 U.S. 449, 457-458 (1958). *See also Lee v. Kemna*, 70 USLW 4104 (U.S. Jan. 22, 2002). Though the District Court rejected this analysis (Pet. App. 55-62), the procedural default issue surrounding some of Gary Cone's Sixth Amendment claims was never ruled upon by the Sixth Circuit. Since much of what the

[22] Tenn. Code Ann. §40-30-112(a) (1990) (repealed) (A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.)

District Court held procedurally defaulted would be directly relevant to establishing prejudice under *Strickland*, a *Strickland* prejudice analysis could not be applied in this case until the procedural default question is decided. This precise procedural default question was not addressed by the Sixth Circuit in light of the court's granting relief under *Cronic*.[23]

Furthermore, Cone had "cause" for any procedural default of a claim of ineffective assistance of counsel based on counsel's investigative failings because, at the time of Cone's first state post conviction proceeding, state law barred any allowance of funds for investigative or expert assistance to develop such a claim or any other grounds for post conviction relief. *Teague v. State*, 772 S.W. 2d 915, 927 (Tenn Cr. App. 1988) (capital post conviction petitioner not entitled to funds). The right to funding for expert and investigative assistance in state capital post conviction proceedings only became available in 1995, nearly a decade after Gary Cone's first post conviction petition was filed. *See Owens v. State*, 908 S.W. 2d 923, 929 (Tenn. 1995). Cone thus cannot be faulted for failing to develop these claims in the state courts. *See (Michael) Williams v. Taylor*, 529 U.S. 420, 432 (2000). Again, though these arguments were rejected by the District Court, they were never addressed by the Sixth Circuit in light of its granting sentencing relief under *Cronic*. Because the claims held by the District Court to be procedurally defaulted bear directly on proof

[23]The Sixth Circuit did address a separate procedural default issue concerning whether other particular claims raised in Cone's second post conviction petition were waived under state law, in light of the language in the Tennessee Post Conviction Statute requiring a waiver of a claim to be knowing and understanding. (Pet. App. 23-26) *see* T.C.A. §40-30-112(b) (1990)(repealed). The argument discussed here, however, was not addressed by the Sixth Circuit.

of prejudice under *Strickland*, they must be considered before a *Strickland* prejudice analysis is undertaken.

The proper consideration of all of these facets of Cone's ineffective assistance of counsel claim under *Strickland* requires detailed analysis of the interplay of Tennessee state law with the relevant procedural default rules, and the Sixth Circuit is the proper forum to conduct such an analysis. *See, e.g. Selvage v. Collins*, 494 U.S. 108, 110 (1990); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 511 (1986). *See also, U.S. v. Cronic*, 66 US at 666-667 (Case remanded to Tenth Circuit to conduct *Strickland* type analysis).

CONCLUSION

For the reasons set forth herein, the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

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In The

Supreme Court of the United States

RICKY BELL, WARDEN,

Petitioner,

v.

GARY BRADFORD CONE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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ARGUMENT

I. THE STATE COURTS' APPLICATION OF *STRICKLAND*, RATHER THAN *CRONIC*, WAS NOT CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW.

Respondent argues that the state courts' failure to presume prejudice to find a violation of the Sixth Amendment right to counsel under the circumstances of this case, *i.e.*, where counsel failed to present mitigation evidence at sentencing and waived closing argument, was contrary to *United States v. Cronic*, 466 U.S. 648 (1984). (Resp. Br. 18) But in practically the next breath, he concedes that this case presents this Court with its first opportunity to consider a claim of ineffective assistance of counsel under those circumstances. (Resp. Br. 37-38) He cannot have it both ways.

In *Williams v. Taylor*, 529 U.S. 362 (2000), Justice O'Connor, writing for the majority, identified the two circumstances under which a state court decision will be "contrary to" clearly established federal law: first, if the state court arrives at a conclusion opposite to that reached by this Court on a question of law; and second, if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. *Williams*, 529 U.S. at 405-06, 412-13. The Court further explained that the state court's decision must be viewed in light of this Court's holdings, as opposed to *dicta*, as of the time of the relevant state court decision. *Id.*, 529 U.S. at 412.

When the state courts decided respondent's ineffective assistance of counsel claim in 1986 and 1987, this Court had never applied *Cronic* to presume prejudice in a

case raising deficiencies in counsel's performance at trial.[1]

Respondent argues, however, that *Strickland* left open the possibility for presumed prejudice based on the "constructive denial" of counsel, citing *Cronic* for that proposition. (Resp. Br. 21-22) But the context of the passage from *Strickland* quoted in respondent's brief gives no explanation of what "constructive denial" of counsel entails, and a subsequent passage (not quoted by respondent) indicates that the Court was referring to a situation where the government is directly responsible for the Sixth Amendment violation: "[S]uch circumstances [where prejudice may be presumed] involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." *Strickland v. Washington*, 466 U.S. 668, 691 (1984). The Court then squarely held that "[c]onflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." *Id.*, 466 U.S. at 693. In *Kimmelman v. Morrison*, 477 U.S. 365 (1986), the Court again distinguished cases involving allegations of "actual" ineffective assistance from the "few contexts where ineffective assistance is 'presumed,' such as where counsel is either totally absent or prevented from assisting the accused during a critical stage of the proceeding . . . and where counsel is burdened by an

---

[1] *Cronic* itself expressly foreclosed such an application when it noted that "claims based on specific errors made by counsel . . . should be evaluated under the standards enunciated in [*Strickland*]." *Cronic*, 466 U.S. at 666 n. 41.

actual conflict of interest." *Kimmelman*, 477 U.S. at 381 n. 6 (citing *Cronic*).

According to respondent, *Cronic* holds that, when counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," there is a constructive denial of counsel requiring that prejudice be presumed. (Resp. Br. 21) In essence, he suggests that *Strickland* and *Cronic* establish different rules for claims of ineffective assistance, depending on the degree of deficiency in counsel's performance, thus presenting the state courts in this case with a "choice" between competing Sixth Amendment rules for evaluating his claim.[2]

Respondent reads this Court's decisions as subjecting only "garden variety" attorney errors to evaluation under *Strickland*'s two-part test. (Resp. Br. 17) But as to those cases in which counsel's performance is "so bad that it is fundamentally equivalent to having no lawyer," respondent maintains that *Cronic* requires that a reviewing court presume prejudice without assessing the likely impact, if any, on the reliability of the proceedings. (Resp. Br. 23)

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[2] Rather than address the reasonableness of the state courts' decision on its terms, *i.e.*, finding that counsel's performance was not deficient under *Strickland*, respondent attempts to circumvent the point by suggesting that the court of appeals' ruling on the performance prong was not fairly included in either of the questions presented in the petition for writ of certiorari. He then recasts the issue before the Court as whether prejudice should be presumed "given" counsel's deficient performance. (Resp. Br. 11-12) But the Warden's petition squarely contests the court of appeals' ruling under §2254(d)(1) that counsel's performance was deficient (Pet. 14-16), and that issue is fairly included within the first question presented.

Respondent's attempt to extract from *Cronic* a separate "rule" for assessing attorney performance is not supported by a fair reading of that decision and, as indicated above, directly contravenes *Strickland*. First, *Cronic* does not purport to modify *Strickland*'s two-part test for deciding ineffective assistance claims. To the contrary, the precise holding of *Cronic* is that the circumstances surrounding counsel's appointment in that case (separate and apart from his actual performance at trial) did not justify a presumption of prejudice. *Id.*, 466 U.S. at 666. That this holding was entirely divorced from counsel's actual performance is confirmed by the Court's subsequent instruction that, "[s]hould respondent pursue claims based on specified errors made by counsel on remand, they should be evaluated under the standards enunciated in [*Strickland*]." *Cronic*, 466 U.S. at 666 n. 41.

Properly understood, *Cronic* simply confirms *Strickland*'s rule that "actual ineffectiveness claims alleging a deficiency in attorney performance" require an affirmative showing of prejudice. *Strickland*, 466 U.S. at 693. The holding in *Strickland* was not limited, as respondent's argument seems to suggest, to claims alleging only "garden variety" deficiencies in attorney performance, as opposed to more egregious errors. Indeed, as argued by the United States, extending *Cronic*'s presumption of prejudice to claims of attorney error would effectively divorce the presumptions noted in *Strickland* and *Cronic* from their policy justification and, given *Strickland*'s recognition that there are "countless ways to provide effective assistance in any given case," would provide no guiding principle for courts to determine the degree of deficiency that would render a demonstration of prejudice under *Strickland* unnecessary. (U.S. Br. 22-23)

Amicus NACDL urges a slightly different approach, suggesting that *Cronic*'s presumption of prejudice applies in the "rare" case where "counsel let the State's case for death go unanswered" or where counsel failed to subject a capital penalty proceeding to "meaningful adversarial testing." (NACDL Br. 11) That suggestion should be rejected outright. First, such a broad reading of *Cronic* is inconsistent with the entire thrust of this Court's Sixth Amendment effective-assistance-of-counsel jurisprudence, which recognizes that the significant societal costs of upsetting a conviction are warranted only when counsel's errors have a prejudicial effect on the ability of the accused to receive a fair trial. (U.S. Br. 11) Second, such a broad reading of the *dicta* in *Cronic* conflicts with the actual holding of *Strickland*, 466 U.S. at 693, that a defendant must affirmatively prove prejudice for any "actual" ineffectiveness claims alleging deficiency in attorney performance. *Accord Roe v. Flores-Ortega*, 528 U.S. 470, 482, 484-85 (2000); *Smith v. Robbins*, 528 U.S. 259, 287 (2000); *Kimmelman*, 477 U.S. at 381. Third, NACDL's suggestions cannot be reconciled with the three decisions of this Court that have applied *Strickland* to alleged attorney deficiencies during a capital sentencing proceeding, despite the fact that counsel's alleged errors in those cases could be described as failing to make a case for life. *See Burger v. Kemp*, 483 U.S. 776, 794-95 (1987) (counsel presented no mitigation evidence at all in two sentencing hearings); *Darden v. Wainwright*, 477 U.S. 168, 184-87 (1986) (counsel relied only on a simple plea from the defendant); *Williams*, 529 U.S. at 415 (Opinion of O'Connor, J.) (consequences of counsel's failure to uncover substantial mitigation evidence "manifested itself during [counsel's] generic, unapologetic closing argument,

which provided the jury with no reasons to spare petitioner's life.").

Indeed, this case demonstrates why such a rule would be judicially unmanageable. Respondent would have *Cronic* apply even though counsel gave an opening statement and cross-examined witnesses, bringing to the jury's attention evidence making a case for life. Respondent's assertion that counsel's performance did not subject the case to "meaningful adversarial testing" essentially reduces to saying that an effort is not "meaningful" if another lawyer might have done more. Aside from swallowing the *Strickland* rule, such a proposition hardly lends itself to principled application.

Contrary to respondent's assertion, *Powell v. Alabama*, 297 U.S. 45 (1932), cannot be read to stand for the proposition that prejudice must be presumed in cases where counsel actively represents the defense but commits especially serious errors in the process. (Resp. Br. 25) *Powell* does not purport to assess counsel's performance at trial; rather, the case provides an example of state interference with counsel's ability to mount a defense when the defendants' trial began "within a few moments after counsel for the first time charged with any degree of responsibility began to represent them." *Powell*, 287 U.S. at 57-58. As the Court explained in *Cronic*, circumstances warranting a presumption of prejudice "may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Cronic*, 466 U.S. at 659-60. By contrast, a claim alleging bad lawyering necessarily requires an examination of the entire record to determine whether counsel's

performance was, in fact, deficient. Once that examination occurs, *Cronic*'s presumption is no longer justified by the policy considerations on which it is based.

In sum, respondent's strained reading of *Cronic*, unsupported by any direct authority of this Court, does not support his contention that the state courts relied on the "wrong Sixth Amendment rule." Not only are the facts of *Cronic* materially distinguishable from this case – in that the specific claim there involved the circumstances surrounding counsel's appointment rather than specific errors by counsel – but the passage from *Cronic* on which respondent relies is, at most, *dicta* and may not function as the standard by which the state courts' decisions are properly evaluated under §2254(d)(1).[3]

As this Court made clear in *Williams*, §2254(d)(1) restricts the source of clearly established law to this Court's holdings, *Williams*, 529 U.S. at 412, and "the *Strickland* test provides sufficient guidance for resolving virtually all ineffective assistance of counsel claims." *Williams*, 529 U.S. at 391. Respondent's specific quarrels with counsel's actions at trial, *i.e.*, failure to present witnesses

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[3] The specific passage on which respondent relies actually appears as part of the Court's enumeration of the types of circumstances in which it has previously held that prejudice to the accused was so likely that the cost of litigating the effect in a particular case is unjustified. The Court cited *Davis v. Alaska*, 415 U.S. 308 (1974), a case in which the defendant's conviction was reversed because he was denied the right to cross-examine a government witness, to illustrate a situation involving a "lack of adversarial testing" of the prosecution's case. As noted in the United States' Brief (20 n. 8), the Court later held that *Davis* did not establish a *per se* reversal rule, and that such errors were subject to a harmless error analysis under *Chapman v. California*, 386 U.S. 18 (1967). *Delaware v. Van Arsdall*, 475 U.S. 673, 683-84 (1986).

at sentencing, failure to explain the significance of a Bronze Star, failure to make an argument in closing rather than in an opening statement, are classic allegations of attorney error that the state courts properly analyzed under *Strickland*.

II. THE STATE COURTS' REJECTION OF CONE'S SIXTH AMENDMENT CLAIM DID NOT INVOLVE AN UNREASONABLE APPLICATION OF *STRICKLAND*.

Respondent argues that counsel failed in his duty in a capital sentencing hearing to present a "case for life," faulting counsel for failing to re-introduce mitigation proof that had been presented during the guilt phase and for failing to make a closing argument. He claims that these omissions must have left the jury with the impression that it "had no choice but to impose death since there was no countervailing case for life to weigh." (Resp. Br. 29)

With regard to presentation of mitigation evidence, respondent points to three specific mitigating factors not developed at the sentencing phase: (1) the effects on Cone of seeing his dead brother being retrieved from a lake at age 8; (2) the effects on Cone of his fiancée's murder in 1972; and (3) the significance of a Bronze Star and why Cone received that decoration. (Resp. Br. 30) Respondent raised none of these factors in state post-conviction proceedings as a basis for his ineffective assistance claim (Pet. App. 77-78), nor was any proof presented at that hearing establishing their effect, if any, on respondent.[4]

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[4] In his state post-conviction appeal, Cone challenged counsel's performance regarding the presentation of mitigation evidence in the following respects: (1) failure to re-call one or both of his mental health experts; (2) failure to call various relatives to testify that Cone was a "gentle child;" (3) failure to re-call Cone's mother at sentencing to make a plea for her son's life; (4) failure to call other background witnesses; and (5) failure to introduce a letter of forgiveness from one of the victims' family members. (R. 4, Add. 2, Doc. 2, Pet. Br. 26-27) On claims two and four, respondent made no proffer of what the testimony of the various background witnesses may have entailed (J.A. 68-71, 74-77), despite a full evidentiary hearing in state court on his post-conviction claims as well as express permission from the trial judge to submit post-hearing affidavits. (R. 4, Add. 2, Doc. 1, TR 208-09)

(R. 4, Add. 2, Doc. 2, Pet. Br. 26) Indeed, respondent's argument regarding the Bronze Star is at odds with his position in state court. In his state post-conviction appeal, Cone acknowledged his counsel's success in "establishing that the defendant had earned the Bronze Star while serving in Vietnam" and did not fault counsel for lack of any further development. (*Id.*) Moreover, defense counsel explained at the post-conviction hearing that his purpose in establishing the Bronze Star through testimony of the State's own witness was to prevent a potential argument by the prosecutor that respondent "was simply a supply clerk in Vietnam and that he would not have had perhaps the exposure to heavy stress that a combat Marine or someone like that would have." (R. 4, Add. 2, Doc. 1, TR 101-02) Despite respondent's suggestion that there was some additional mitigating significance to the Bronze Star beyond the fact of its award, he cannot point to any evidence in the record that establishes any such enhanced mitigating potential.[5]

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[5] Contrary to respondent's suggestion (Resp. Br. 47-48), mitigating evidence not developed in state post-conviction proceedings has no place in an analysis of the reasonableness of the state courts' application of clearly established law. A state

Although respondent acknowledges that proof of drug dependence and post-traumatic stress disorder arising out of his military service in Vietnam (presented in the guilt phase) is properly considered as mitigating evidence, he argues that there was more mitigation evidence available that counsel could have presented. (Resp. Br. 33) Again, however, respondent has failed to identify any evidence in the record before the state court to support his contention. Moreover, his claim that mental health evidence should have been re-introduced at the sentencing phase is undercut by his own recognition that evidence of mental illness is a potential "two-edged sword" that could actually have worked to his detriment at sentencing. (Resp. Br. 37 n. 19) Such a dilemma presents counsel with a classic tactical choice to which courts must defer under *Strickland*.

Respondent also argues that counsel's justification for not calling background witnesses, *i.e.*, to foreclose any possibility that the State would emphasize evidence of other bad acts, is not supported by Tennessee law. Citing *Cozzolino v. State*, 584 S.W.2d 765 (Tenn. 1979), respondent argues that proof of a troubled background introduced to show the origin of a defendant's criminal acts would not have "opened the door" to cross-examination about other bad acts of the respondent. (Resp. Br. 34-35) Even if *Cozzolino* stood for the proposition respondent asserts,[6]

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court cannot be faulted for failing to factor into its analysis of a defendant's ineffective assistance claim evidence not before it. *See, e.g., Williams*, 529 U.S. at 394-96 (assessing the reasonableness of the Virginia Supreme Court's decision under *Strickland* in light of evidence presented in the Virginia trial court).

[6] Respondent simply misreads *Cozzolino*, which did not purport to establish a broad rule for the admission of specific

the state post-conviction record is devoid of any proof concerning what testimony any potential background witnesses might have offered had they been called at sentencing, much less any proof that the murders were somehow traceable to the circumstances of respondent's childhood. And, in any event, there is no question that under Tennessee law the prosecution is permitted to rebut any mitigating factors relied upon by the defense. Tenn. Code Ann. §39-2-203(c) (1982); *see also State v. Bane*, 57 S.W.3d 411, 424 (Tenn. 2001) (evidence of a defendant's family background may be rebutted by proof of other bad acts). Because respondent failed to demonstrate in state post-conviction proceedings the substance of the testimony his potential background witnesses might have given, counsel's decision not to call them must be presumed reasonable. *See, e.g., Burger*, 483 U.S. at 792 (where the record contains no evidence that potential witnesses would have offered substantial mitigating evidence if they had testified, court may not reach the conclusion that counsel's failure to call the witnesses was unreasonable). Moreover, the defense theory throughout trial was that the murders were the result of psychological damage sustained as a result of service in Vietnam, not childhood trauma.[7]

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types of evidence at a capital sentencing hearing. It merely held that the State may not introduce evidence of other bad acts committed by the defendant in anticipation of defendant's case in mitigation. "One cannot rebut a proposition that has not been advanced." *Cozzolino*, 584 S.W.2d at 768.

[7] Trial counsel's closing argument in the guilt phase summarized that theory as follows: "Gary Cone was a normal individual, a stellar scholar, a member of a family unit before he went off to a faraway place called Vietnam. . . . But I told you something had caused a change. And I told you that we would

With regard to closing argument, respondent argues that counsel's failure to make a closing argument must have left the jury with the impression that it had no choice but to impose death and that no case for life could be made. (Resp. Br. 29-30) Citing *Herring v. New York*, 422 U.S. 853 (1975), respondent argues that it is critical to give a closing argument after all the evidence has been presented. Respondent's argument is unavailing for several reasons. First, *Herring* does not support respondent's position because that case involved a denial of closing argument, not counsel's tactical decision to waive argument – a decision that must be judged under the standards enunciated in *Strickland*. Moreover, the specific aggravating circumstances upon which the State intended to rely were known to Cone's defense team before any evidence was presented at the sentencing phase, and there was little proof introduced at sentencing to establish those aggravators beyond what had already been presented at the guilt phase. Finally, respondent's counsel actually argued in his opening statement at the sentencing phase all of the mitigating evidence presented in the guilt phase, including Cone's expression of remorse, and he had asked the jury for mercy. (J.A. 23-27) Since the jury had already heard from counsel, it is not credible to conclude that the jury "could only have inferred" from counsel's decision to waive closing argument that he agreed with the prosecutor. (Pet. App. 36) Because the prosecutor did not argue that there were no mitigating circumstances, it strains logic to suggest that the jury must have inferred from counsel's failure to respond that

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deal with two Gary Cones. One, I submit, is this Gary Cone pictured as he was many years ago. And one that I submit is this Gary Cone pictured as he was in August of 1980." (J.A. 19-20)

there were none. Indeed, the arguments of respondent and NACDL wholly ignore the countervailing negative consequences facing the respondent had counsel given a closing argument, such as the effect of a powerful rebuttal by the more experienced prosecutor and the opportunity for the prosecutor to cure what counsel reasonably believed to be reversible error in prosecution strategy in pursuing an aggravating circumstance (one of four upon which the prosecution relied) not supported by the evidence.[8]

Respondent argues that *Strickland, Darden, Burger* and *Williams* are distinguishable from this case because, although counsel in those cases failed to present mitigating proof, they did not also waive closing argument.

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[8] Although respondent takes issue with counsel's decision to allow the State to argue for an invalid aggravating circumstance in hopes of a reversal (Resp. Br. 35), counsel's strategy was not unfounded. Just as counsel predicted, on appeal, the Tennessee Supreme Court in fact held that the jury improperly relied on one of the four aggravators returned, but concluded that the error was harmless. (Pet. App. 98-99) At the time of Cone's trial, however, the Tennessee Supreme Court had not previously applied a harmless error analysis in a case where a death sentence was based, in part, on an invalid aggravating circumstance. For example, in *State v. Pritchett*, 621 S.W.2d 127 (Tenn. 1981), the court reversed a death sentence where the evidence was insufficient to support one of two aggravating circumstances. Likewise, in *State v. Moore*, 614 S.W.2d 348, 351 (Tenn.1981), the court overturned the defendant's death sentence and remanded for re-sentencing where one of the aggravating circumstances returned by the jury was held to be invalid. It was not until *State v. Workman*, 667 S.W.2d 44 (Tenn. 1984), decided after respondent's trial, that the Tennessee Supreme Court applied a harmless error analysis to a case where the jury erred as to one aggravating circumstance, but others were clearly established. Counsel cannot be faulted for failing to anticipate that change in Tennessee law.

(Resp. Br. 38) First, respondent's counsel argued the existence of mitigating circumstances and asked for simple mercy, just as counsel did in the above-cited cases. (J.A. 23-27) The only difference between what occurred in those cases and in this case is that respondent's counsel did so at the beginning of the sentencing phase instead of the end. Counsel's opening statement concerning mitigation and his plea for mercy was still fresh in the jury's mind when it retired to deliberate. Sentencing phase opening statements were delivered at approximately 12:07 p.m. (R. 4, Add. 1, Doc. 1, TR 2110) The jury left the courtroom to deliberate at approximately 3:05 p.m. that same day. (R. 4, Add. 1, Doc. 1, TR 2150)

Respondent articulates no principled basis for creating a special rule for the waiver of closing argument at a capital sentencing hearing. In essence, respondent urges this Court to hold that a defendant's Sixth Amendment rights are violated unless, at a minimum, counsel in a capital sentencing hearing gives a closing argument to ask the jury for mercy. But such a rule would require this Court to repudiate its observation in *Strickland* that

> [n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland, 466 U.S. at 688-90. *See also Flores-Ortega*, 528 U.S. at 481 (rejecting *per se* rules for counsel's performance as inconsistent with *Strickland*'s admonition against imposing "mechanical rules on counsel" with respect to reasonable strategic choices).

That even the best lawyers may disagree on how best to defend a particular case is vividly illustrated by the testimony of respondent's own experts in the state post-conviction proceeding, both of whom declined to opine that counsel's decision to waive closing argument fell below the standard of competence expected of defense counsel in criminal cases. One of them, qualified as an expert in criminal defense tactics, testified for the respondent that he could not say whether counsel's reliance on his opening statement at sentencing in lieu of a closing argument was outside the range of competence. "I would [make a closing], but in all fairness to Mr. Dice, I can't say that my decision is the only right decision." (R. 4, Add. 2, Doc. 1, TR 78) Respondent's other expert, qualified in the defense of capital cases in Tennessee, testified that he had waived closing on several occasions for the same reason advanced by Cone's trial counsel, *i.e.*, to prevent Assistant District Attorney Strother from delivering a devastating closing:[9]

> I have on prior occasions, on several prior occasions, waived final argument in a criminal case. I consider it to be a tactical decision on my part . . . I have done it – specifically in cases involving Mr. Strother, deliberately. . . . Mr. Strother is – they're both good lawyers. Mr.

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[9] Although the expert testified that his own waivers had occurred in non-capital cases, there is nothing in his testimony to suggest that such a tactical maneuver would never be appropriate in a capital case.

> Strother is very good at giving – if you leave him too much room in which to operate, he'll do a very effective job on his closing argument, I assure you. He's done it many, many times. I have specifically waived final argument in cases in which he has been involved, and in my judgment, successfully by the way.

(R. 4, Add. 2, Doc. 1, TR 183) When asked whether the opening statement made by respondent's counsel would suffice as a closing argument in the penalty phase of a capital trial, the expert responded that he was "not prepared really to say that it does or does not." (R. 4, Add. 2, Doc. 1, TR 184)

As a practical matter, counsel had nothing to add to his opening statement by way of a closing argument. He had already informed the jury of reliance on the guilt-phase mitigating evidence concerning Cone's mental status and drug dependence, and he had asked for mercy on behalf of his client. In addition, he had emphasized during his opening Cone's remorse over the murders. Indeed, respondent does not identify any particular point that should have been made to the jury in a closing argument that had not already been made just three hours earlier in counsel's opening statement. The unspeakably brutal nature of Cone's crimes foreclosed any argument that anyone could have been justified in committing them. There was no "residual doubt" evidence to suggest that Cone was not the perpetrator. Moreover, the jury had rather emphatically rejected Cone's mental health defense by returning its guilt phase verdict after only an hour of deliberation. (R. 4, Add. 2, Doc. 1, TR 156) The evidence of three of the four aggravating circumstances upon which the State relied was overwhelming and could not be credibly challenged. And counsel was understandably reluctant to argue that the

jury should not rely on the fourth aggravating circumstance, since he believed (not without reason under Tennessee case law at the time) that a jury verdict based on that aggravating circumstance would be subject to automatic reversal on appeal.

Notwithstanding these facts, respondent asserts that "[t]here is no professionally acceptable reason to fail to make a case for life even if for no other reason than to ask for mercy." (Resp. Br. 41) Respondent's argument is premised on the assumption that mercy *per se* is a sufficient basis for imposing life. But under Tennessee's sentencing scheme, the jury *must* return a verdict of death if it finds that at least one aggravating circumstance exists and that there are no countervailing mitigating circumstances. Tenn. Code Ann. §39-2-203(g) (1982). Respondent's jury was specifically instructed that "if you unanimously determine that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proven by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence *shall* be death." (J.A. 57) (emphasis added)[10]

Moreover, the Tennessee Supreme Court has upheld a trial court's refusal to give a "mercy" instruction. *State v. Melson*, 638 S.W.2d 342, 366 (Tenn. 1982); *see also State v. Hartman*, 703 S.W.2d 106, 119 (Tenn.1985) (trial courts not required to give charge on mercy). Because mercy divorced from mitigating circumstances is legally irrelevant in the capital sentencing calculus under Tennessee

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[10] This Court upheld the constitutionality of such an instruction in *Blystone v. Pennsylvania*, 494 U.S. 299 (1990). *See State v. Keen*, 926 S.W.2d 727 (Tenn. 1996) (applying *Blystone's* rule to Tennessee's capital sentencing scheme).

law, a lawyer surely does not fail to act reasonably by not making such an argument.[11]

In *Strickland*, this Court instructed that courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 689. The Tennessee courts fully understood that instruction and reasonably applied *Strickland* to find that respondent received constitutionally effective assistance at his capital sentencing hearing. The state courts' decisions are supported by the record, including the testimony of respondent's own experts. Despite respondent's attempt to re-frame the issue wholly in terms of prejudice, the state courts reasonably applied *Strickland* and *Darden* to find that counsel's failure to present mitigating evidence at sentencing and waiver of closing argument were legitimate tactical decisions.

III. A REMAND IS UNNECESSARY BECAUSE THE REASONABLENESS OF THE STATE COURTS' APPLICATION OF *STRICKLAND* TO THE FACTS OF CONE'S CASE HAS ALREADY BEEN PRESENTED TO THE COURT OF APPEALS AND IS FAIRLY INCLUDED IN THE FIRST QUESTION PRESENTED FOR REVIEW IN THIS COURT.

Respondent argues that, if this Court determines that the court of appeals erred in granting habeas relief under *Cronic*, it should remand the case to that court for consideration of Cone's claims under the two-prong test of

[11] Moreover, if counsel had made a closing argument as respondent suggests, "for no other reason than to ask for mercy," he may well have been faulted for leaving the jury with the impression that he lacked confidence in the strength of the mitigating evidence.

Strickland. He contends that neither of the questions presented in the petition for writ of certiorari fairly include the Sixth Circuit's proper application of *Strickland* to the facts of his case. (Resp. Br. 44-45) Alternatively, he argues that a remand is necessary to address the district court's alleged erroneous application of *Lockhart v. Fretwell*, 506 U.S. 364 (1993), in its assessment of respondent's ineffective assistance claim. (Resp. Br. 45-46) The fallacy of both of these arguments is that they rest on the assumption that the federal courts' application of *Strickland* (or *Cronic*) to the facts of respondent's case is at issue. But the question is not whether the federal courts properly applied this Court's Sixth Amendment jurisprudence to resolve Cone's claim on the merits, but whether the state courts' adjudication of respondent's ineffective assistance claim was "contrary to, or involved an unreasonable application of, clearly established Federal law" under §2254(d)(1).

The Warden's petition squarely contests the court of appeals' ruling that counsel's performance was deficient (Pet. 14-16), and that issue is fairly included in the first question presented. The petition directly challenges the Sixth Circuit's decision granting habeas relief on Cone's ineffective assistance of counsel claim in view of the restrictions upon its authority imposed by §2254(d)(1), and it therefore necessarily raises the question whether the state courts' adjudication of Cone's claim was either contrary to or involved an unreasonable application of *Strickland* in any of its dimensions. Just as clearly, the district court's treatment of the issue is beside the point (Resp. Br. 45-46), since appellate review of that court's summary disposition of respondent's habeas claim is *de novo*. *Groseclose v. Bell*, 130 F.3d 1161, 1163 (6th Cir. 1997), *cert. denied*, 523 U.S. 1132 (1998).

Finally, nothing will be gained by remanding the case to the court of appeals with instructions to perform the analysis required by §2254(d)(1). That court's outright rejection of the state courts' determination of respondent's claim makes unmistakably clear its view of the state courts' decision. Moreover, the court of appeals had the benefit of this Court's decision in *Williams v. Taylor* when it decided this case and, thus, has already considered and rejected the Warden's contention that §2254(d)(1), as construed by *Williams*, forecloses habeas relief in the circumstances of this case. All that a remand for further consideration of the Warden's contention will accomplish is additional needless delay.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 01-400

In the Supreme Court of the United States

RICKY BELL, WARDEN, PETITIONER

v.

GARY BRADFORD CONE

ON WRIT OF CERTIORARI TO THE UNTIED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CAPITAL CASE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The United States will address the following question:

Whether respondent's claim that counsel rendered ineffective assistance at a capital sentencing hearing by failing to present mitigating evidence and a closing argument is analyzed under *Strickland* v. *Washington*, 466 U.S. 668 (1984), or is subject to a presumption of prejudice under *United States* v. *Cronic*, 466 U.S. 648 (1984).

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In the Supreme Court of the United States

No. 01-400

RICKY BELL, WARDEN, PETITIONER

v.

GARY BRADFORD CONE

ON WRIT OF CERTIORARI TO THE UNTIED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CAPITAL CASE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether defense counsel's failure at a capital sentencing hearing to present mitigating evidence and a closing argument constitutes deficient representation that is conclusively presumed to be prejudicial. The United States has a substantial interest in the resolution of the question presented because claims of ineffective assistance of counsel under the Sixth Amendment are frequently asserted on collateral review in federal criminal cases. Although this case involves a state prisoner seeking relief under 28 U.S.C. 2254, the Court's decision is also

likely to affect ineffective-assistance-of-counsel claims brought by federal prisoners under 28 U.S.C. 2255.

STATEMENT

1. On August 9, 1980, respondent embarked on a violent two-day crime spree when he robbed a jewelry store in Memphis, Tennessee, of approximately $112,000 worth of watches, rings, and other items. Pet. App. 40. After the owner of the store alerted authorities and provided a description of the robber, police spotted respondent, who led them on a high-speed chase through mid-town Memphis and into a residential neighborhood. *Id.* at 85. There he abandoned his vehicle, and shot pursuing police officer B.C. Allen and a citizen, John Douglas Clark. Respondent also attempted to shoot another citizen, Herschel Dalton, after Dalton refused to surrender his car. *Id.* at 40.

On the following morning, respondent appeared at the door of an apartment in the same neighborhood and drew a pistol on resident Lucille Tuech when she refused to allow him to enter. Later that day, respondent broke through the back door of the home of an elderly couple, Shipley and Cleopatra Todd. Mr. Todd was 93 years old; Mrs. Todd was 79. Respondent killed the Todds after they refused to cooperate with him. Their brutally beaten and mutilated bodies were discovered three days later. Pet. App. 40-41.

2. a. A Tennessee grand jury indicted respondent on two counts each of first degree murder and murder in the perpetration of a burglary against Mr. and Mrs. Todd; three counts of assault with intent to commit murder in the first degree against Dalton, Allen, and Clark; and one count of robbery with a deadly weapon of the jewelry store. In April 1982, respondent was tried before a jury in the Criminal Court of Shelby

County. Pet. App. 41-42. The defense admitted committing the charged acts but contended that respondent was insane or lacked the mental capacity for the offenses because of drug abuse and stress arising from respondent's prior military service in Vietnam. *Id.* at 86, 103. In support of that theory, defense counsel presented two medical experts who testified that respondent suffered from "amphetamine psychosis" and post-traumatic stress syndrome. Trial Tr. 1670-1677, 1722-1762. The jury found respondent guilty on all counts.

b. During the penalty phase, defense counsel gave an opening statement in which he told the jurors that they could consider as mitigating evidence the proof of respondent's mental condition that was presented during the guilt phase, and that the judge would so instruct them. Pet. App. 114.[1] Counsel reviewed for the jury the testimony of the defense's two medical experts that respondent suffered from "amphetamine psychosis" and post-traumatic stress syndrome. *Id.* at 90, 115. Defense counsel concluded his opening remarks by arguing that "[t]here is good reason for maintaining life if you look at the whole man in this particular case" and by arguing that the jury's "mercy" would "raise[] [the jurors] to the level of God." *Id.* at 116, 117. Defense counsel also elicited, on cross-examination of a prosecution witness, testimony that respondent had

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[1] Section 39-2-203(e) of the 1982 Tennessee Code Annotated provides that the judge shall instruct the jury to consider "any mitigating circumstances and any statutory aggravating circumstances * * * which may be raised by the evidence at either the guilt or sentencing hearing, or both." The jury in this case was so instructed. Trial Tr. 2219. The jury was also instructed that mitigating circumstances could include the defendant's mental condition at the time of the offenses. *Id.* at 2221.

received a Bronze Star for his military service in Vietnam and had been honorably discharged. Trial Tr. 2123-2124. Counsel also interposed several objections during the prosecution's direct examinations, *id.* at 2129, 2130, one of which thwarted the prosecution's attempt to show the jury photographs of the murder victims' bodies taken several days after death, *id.* at 2134-2143. After the junior prosecuting attorney made a brief closing statement, respondent's counsel waived final argument. *Id.* at 2144-2147. The jury unanimously found four aggravating factors and no countervailing mitigating circumstances for each of the murders and sentenced respondent to death. *Id.* at 2223-2226. The Tennessee Supreme Court affirmed his convictions and sentence, *State* v. *Cone*, 665 S.W.2d 87 (1984) (Pet. App. 84-100), and this Court denied certiorari, 467 U.S. 1210 (1984).[2]

3. a. On June 22, 1984, respondent filed his first state court petition for post-conviction relief contending, *inter alia*, that trial counsel had rendered constitutionally ineffective assistance during the death penalty phase of the trial by failing to present mitigating evidence and by waiving final argument. The court rejected those contentions after a hearing in which trial counsel testified. Post-Conviction Hearing Tr. 91-173. The court found that counsel had "put a great deal of thought and preparation in this case." Pet. App. 29. With respect to mitigating evidence, the court found that counsel had "interviewed numerous family

[2] The Tennessee Supreme Court expressed doubt that the record supported the jury's finding of the fourth aggravating factor that respondent knowingly created a great risk of death to two or more people other than the murder victims, but the court held that any error was harmless. Pet. App. 98-99.

members and relatives whose testimony was contradictory and generally not helpful," and that his strategy was "to get as much mitigation in during the guilt/innocence phase as he could." *Ibid.* The court also found that counsel did not present a final argument as part of counsel's strategy to prevent the senior prosecutor from making a "devastating" closing argument of the type for which he was well known. *Ibid.*

b. The Tennessee Court of Criminal Appeals affirmed. Pet. App. 101-111. The court rejected respondent's claim that counsel was ineffective in failing to present mitigating evidence during the penalty phase. *Id.* at 108-110. The court explained that two defense medical experts had testified during the guilt phase, and that trial counsel was aware that the judge would instruct the jury during the penalty phase to consider mitigating evidence presented during the earlier phase. *Id.* at 108. The court further explained that counsel reasonably declined to present respondent's relatives and associates as witnesses at sentencing and that "[t]here is nothing in the record to show that the testimony of these witnesses would have benefited the defense." *Id.* at 109. The court also held that it was "a legitimate trial tactic" for counsel to waive closing argument to prevent the prosecution from making a "very devastating closing argument[ ]" that "could not be answered by defense counsel." *Id.* at 110. The court concluded that "trial counsel's work and diligence could not remove the overwhelming evidence against [respondent]" and that "the findings of guilt and the imposition of the death penalty were based upon the facts and the law—not [on] shortcomings of counsel." *Id.* at 111.

The Tennessee Supreme Court denied respondent's permission to appeal, and this Court denied certiorari. 488 U.S. 871 (1988).

4. After respondent's second state petition for collateral relief was rejected as procedurally barred, respondent filed a petition for federal habeas corpus relief under 28 U.S.C. 2254 in the United States District Court for the Western District of Tennessee. In denying the petition, the district court held that respondent had failed to show any prejudice from counsel's failure to offer mitigating evidence during the penalty phase. Pet. App. 77-80. The court observed that counsel's performance did not involve a "total abdication of representation," because "counsel had already introduced some mitigating evidence, and his rejection of other evidence was based on specific analysis of the tactical effect of that evidence." *Id.* at 80.

The district court also found that respondent had not refuted the state court's determination that counsel's decision to forego closing argument was "a tactical choice to foreclose rebuttal argument by the prosecution." Pet. App. 81. The district court reasoned that

> [a] review of the closing remarks by the first prosecutor confirm that they were relatively straightforward—simply a recitation of the existence of four aggravating circumstances. There was no dispute that three of these circumstances definitely existed, and [respondent] presents no argument that any statement counsel might have made would have persuaded the jury to give greater consideration to the evidence of mitigation introduced during the guilt phase.

Ibid. (citation and footnote omitted).

5. The Sixth Circuit rejected respondent's attacks on his convictions but found merit in his challenge to his sentence. Pet. App. 1-38. The court of appeals concluded that counsel's performance at sentencing in failing to present mitigating evidence and to give a closing argument was deficient under the performance prong of *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). Pet. App. 31-36. The court reasoned that counsel "presented no mitigating evidence at all," *id.* at 33, and that "a reasonable attorney would have realized the absolute necessity of arguing for his client's life by making a closing argument." *Id.* at 35. The court further stated that the jury "could only have inferred that [respondent's] counsel was, by his silence, acquiescing to the prosecutor's plea that [respondent] be sentenced to death." *Id.* at 36.

The court concluded that "a presumption of prejudice is raised by counsel's behavior; thus [respondent] need not show actual prejudice." Pet. App. 37. The court observed (Pet. App. 32) that this Court in *United States* v. *Cronic*, 466 U.S. 648, 659 (1984), stated that prejudice may be presumed where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." The court of appeals held that, "[e]ssentially, [respondent] did not have counsel during the sentencing phase of his trial and thus the prosecutor's insistence that justice required that [respondent] be put to death was not subjected to 'meaningful adversarial testing.'" Pet. App. 37 (quoting *Cronic*, 466 U.S. at 656).

SUMMARY OF ARGUMENT

A. In *Strickland* v. *Washington*, 466 U.S. 668 (1984), this Court announced a two-part test to govern all ineffective assistance of counsel claims alleging

attorney error. First, the defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Second, the defendant must show that "the deficient performance prejudiced the defense." *Id.* at 687.

Only in narrowly defined contexts has this Court not required a showing of prejudice to establish a Sixth Amendment violation. This Court has applied a conclusive presumption of prejudice when the government has totally denied counsel to a defendant, or when the government has interfered with counsel's ability to function at a critical stage of a proceeding. *Strickland*, 466 U.S. at 686, 692; *United States* v. *Cronic*, 466 U.S. 648, 659 n.25 (1984). The Court also has applied a "limited" presumption of prejudice when counsel labored under a conflict of interest. *Strickland*, 466 U.S. at 692 (discussing *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980)). Those contexts are fundamentally different from a claim that counsel rendered ineffective assistance by making specific errors during the presentation of the case. Such conduct is not directly attributable to government action. Nor is any deficiency in performance readily identifiable without contextual inquiry. And prejudice from attorney error is not so likely in every case that a fact-specific inquiry into prejudice is not worth the cost. *Strickland*, 466 U.S. at 692-693; *Smith* v. *Robbins*, 528 U.S. 259, 287 & n. 15 (2000).

B. Respondent's claim that his counsel was ineffective at his capital sentencing hearing by failing to present mitigating evidence and a closing statement is subject to the prejudice prong of *Strickland*. This Court already has held that *Strickland*'s two-part test applies to claims raising attorney error in failing to present mitigating evidence at a capital sentencing hearing. *Williams* v. *Taylor*, 529 U.S. 362, 395-399

(2000); *Burger* v. *Kemp*, 483 U.S. 776, 788 (1987); *Darden* v. *Wainwright*, 477 U.S. 168, 184 (1986); *Strickland*, 466 U.S. at 698-699. There is no basis for a different treatment of claims of attorney error in failing to give a closing argument at sentencing. Like any trial decision, a waiver of closing argument may be both reasonable and non-prejudicial depending on the facts and circumstances of a particular case. The government has not prevented counsel from presenting closing argument, and it is not easy to identify such a decision as a denial of the right to counsel that is likely to be prejudicial in all cases.

C. The court of appeals erred in presuming prejudice based on this Court's statement in *Cronic*, 466 U.S. at 659, that prejudice may be presumed "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." That statement is best understood as reserving the possibility that this Court would presume prejudice where counsel *totally* fails to participate in the defense. Extending the dicta in *Cronic* to claims that an attorney committed error by failing to present certain evidence or make certain arguments, however, would swallow the rule in *Strickland*. It would also undermine society's interest in the finality of convictions without serving any countervailing Sixth Amendment values. Properly understood, *Cronic*'s presumption of prejudice has no application to this case because counsel actively participated and assisted respondent at sentencing.

ARGUMENT

COUNSEL'S PERFORMANCE DOES NOT VIOLATE THE SIXTH AMENDMENT ABSENT A SHOWING OF PREJUDICE UNDER *STRICKLAND* v. *WASHINGTON*

A. *Strickland* v. *Washington* Governs All Claims Of Ineffective Assistance Of Counsel Based On Attorney Error

1. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." That right is "fundamental to our system of justice." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981); see *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984); *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963). As this Court has explained, "[l]awyers in criminal cases 'are necessities, not luxuries.' Their presence is essential because they are the means through which the other rights of the person on trial are secured." *United States* v. *Cronic*, 466 U.S. 648, 653 (1984) (footnote omitted). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland*, 466 U.S. at 685.

This Court's decision in *Strickland*, *supra*, announced a general test for reviewing claims of ineffective assistance of counsel. Under *Strickland*, a claim of ineffective assistance of counsel at trial or capital sentencing has two components. First, the defendant must show that counsel's performance was deficient, in that "counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688. Second, the defendant must show that "the deficient performance prejudiced the defense" (*id.* at 687) in the sense that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*id.* at 694).

The requirement that a defendant must show prejudice reflects the principle that "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Cronic*, 466 U.S. at 658. "Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Ibid.*; see also *Lockhart* v. *Fretwell*, 506 U.S. 364, 369 (1993); *Kimmelman* v. *Morrison*, 477 U.S. 365, 374 (1986); *Strickland*, 466 U.S. at 686; *Nix* v. *Whiteside*, 475 U.S. 157, 175 (1986); *United States* v. *Morrison*, 449 U.S. at 364-365. Accordingly, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland*, 466 U.S. at 692.

2. *Strickland* involved a capital sentencing proceeding, which the Court found enough like a trial to make the description of the duties of counsel in the two contexts essentially equivalent. 466 U.S. at 686-687. Since *Strickland*, the Court has applied its two-part test in a variety of contexts besides trial and capital sentencing. The Court has employed *Strickland* to evaluate ineffectiveness claims in the entry of a guilty plea (*Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985)); in failing to file pre-trial motions to suppress evidence on Fourth Amendment grounds (*Kimmelman* v. *Morrison*, 477 U.S. 365, 390-391 (1986)); and in failing to pursue claims arising from sentencing determinations made under the United States Sentencing Guidelines (*Glover* v. *United*

States, 531 U.S. 198, 203-204 (2001)). The Court has also applied *Strickland* to several types of ineffectiveness claims connected with the appeals process. The Court has employed *Strickland* to evaluate counsel's failure to raise a capital sentencing claim on appeal (*Smith* v. *Murray*, 477 U.S. 527, 535-536 (1986)); counsel's failure to file a notice of appeal (*Roe* v. *Flores-Ortega*, 528 U.S. 470, 477 (2000)); and counsel's decision to file an *Anders* (or equivalent) brief rather than a full merits brief on appeal (*Smith* v. *Robbins*, 528 U.S. 259, 285 (2000)). Considering the wide range of claims to which the Court has applied *Strickland*, it is not surprising that the Court recently noted that "the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims." *Williams* v. *Taylor*, 529 U.S. 362, 391 (2000).

3. This Court has presumed prejudice only in narrowly defined Sixth Amendment contexts. *Strickland*, 466 U.S. at 692; see also *Smith* v. *Robbins*, 528 U.S. at 287; *Kimmelman* v. *Morrison*, 477 U.S. at 381 n.6. This Court has not required any showing of prejudice when the government has totally denied a defendant the assistance of counsel, or when the government has interfered with counsel's ability to represent the defendant at a critical stage of the proceeding. See *Strickland*, 466 U.S. at 692 ("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.") see also *Cronic*, 466 U.S. at 659 & n.25 ("The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial" or if counsel is "prevented from assisting the accused during a critical stage of the proceeding."). "Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not

worth the cost." *Strickland*, 466 U.S. at 692; *Cronic*, 466 U.S. at 658. "Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." *Strickland*, 466 U.S. at 692.[3]

The Court has also applied a "limited[] presumption of prejudice" when the claim is that counsel represented conflicting interests. *Strickland*, 466 U.S. at 692. When counsel is burdened by an actual conflict of interest, prejudice is presumed "if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Ibid.* (quoting *Cuyler* v. *Sullivan*, 446 U.S. 335, 348, 350 (1980)); see also *Smith* v. *Robbins*, 528 U.S. at 287. The Court in *Strickland* reasoned that when counsel is burdened by an actual conflict of interest, he breaches "the most basic of counsel's duties" and "it is difficult to

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[3] The Court has found constitutional error without any showing of prejudice where the defendant was denied counsel at trial (*Johnson* v. *Zerbst*, 304 U.S. 458, 467-468 (1938)); at arraignment (*Hamilton* v. *Alabama*, 368 U.S. 52, 53-54 (1961)); or at a preliminary hearing (*White* v. *Maryland*, 373 U.S. 59, 60 (1963) (per curiam). The Court similarly has not required a showing of prejudice when the government "interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Strickland*, 466 U.S. at 686 (citing *e.g.*, *Geders* v. *United States*, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); *Herring* v. *New York*, 422 U.S. 853 (1975) (bar on summation at bench trial); *Brooks* v. *Tennessee*, 406 U.S. 605, 612-613 (1972) (requirement that defendant be first defense witness); *Ferguson* v. *Georgia*, 365 U.S. 570, 593-596 (1961) (bar on direct examination of defendant)); see also *Cronic*, 466 U.S. at 660-661 (describing appointment of counsel on the day of capital trial in *Powell* v. *Alabama*, 287 U.S. 45 (1932)).

measure the precise effect on the defense of representation corrupted by conflicting interests." 466 U.S. at 692. The Court also explained that "a fairly rigid rule" is justified "[g]iven the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts." *Ibid.*

By contrast, a defendant claiming ineffective assistance of counsel from attorney errors must *always* show prejudice. "Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." *Strickland*, 466 U.S. at 693. The Court in *Strickland* explained that a presumption of prejudice is fundamentally inconsistent with the fact-specific nature of a claim based on attorney error:

> The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.

Ibid.; see also *id.* at 702 (Brennan, J., concurring in part and dissenting in part) ("[C]laims of ineffective assis-

tance based on allegations of specific errors by counsel * * * by their very nature[] require courts to evaluate both the attorney's performance and the effect of that performance on the reliability and fairness of the proceeding.").

This Court has applied those principles in the appellate context by "distinguish[ing] [between] denial of counsel altogether on appeal, which warrants a presumption of prejudice, from mere ineffective assistance of counsel on appeal, which does not." *Smith* v. *Robbins*, 528 U.S. at 286. The Court refused to presume prejudice in *Smith* v. *Robbins* when the defendant received appellate counsel who declined to file a full merits brief on appeal pursuant to a valid state procedure under *Anders* v. *California*, 386 U.S. 738 (1967). The Court explained that "it is not the case that, if an attorney unreasonably chooses to follow a procedure such as *Anders* * * * instead of filing a merits brief, prejudice is so likely that case-by-case inquiry into prejudice is not worth the cost. * * * [A]n error by counsel is neither 'easy to identify' (since it is necessary to evaluate a defendant's case in order to find the error) nor attributable to the prosecution." *Id.* at 287 & n.15 (internal quotation marks omitted); see also *Roe* v. *Flores-Ortega*, 528 U.S. at 483-484 (2000) (declining to presume prejudice *per se* where counsel neglected to file notice of appeal and holding that under *Strickland* defendant must show reasonable probability that he would have timely appealed but for counsel's errors).

B. Respondent's Claim That His Counsel Was Ineffective At Sentencing In Failing To Present Mitigating Evidence and To Make A Closing Argument Is Subject To The Prejudice Prong Of *Strickland* v. *Washington*

1. This Court's decisions firmly establish that a claim that counsel was constitutionally deficient in failing to present mitigating evidence at a capital sentencing proceeding must be evaluated under both prongs of *Strickland*. *Strickland* itself involved allegations of attorney error in failing to investigate and present mitigating evidence during the sentencing phase in a capital murder case, 466 U.S. at 675, and the Court found that, "even assuming the challenged conduct of counsel was unreasonable, respondent suffered insufficient prejudice to warrant setting aside his death sentence," *id.* at 698-699.

Two years after *Strickland* was decided, the Court held in *Darden* v. *Wainwright*, 477 U.S. 168, 184 (1986), that a claim that trial counsel had rendered ineffective assistance by failing to present mitigating evidence at a capital sentencing hearing "must be evaluated against the two-part test announced in *Strickland* v. *Washington*, 466 U.S. 668 (1984)." The Court followed the same approach the following year in *Burger* v. *Kemp*, 483 U.S. 776, 788 (1987), which rejected under the performance prong of *Strickland* a prisoner's claim that his trial attorney rendered ineffective assistance by "offer[ing] no mitigating evidence at all" at two capital sentencing hearings.

Most recently, in *Williams* v. *Taylor*, 529 U.S. at 395-399, the Court found both prongs of *Strickland* satisfied in evaluating claims that counsel rendered ineffective assistance in failing to investigate and present mitigating evidence in the sentencing phase of a capital case. Despite the seriousness of the errors claimed in

that case, the Court did not bypass the prejudice prong of *Strickland*, but concluded that the errors were prejudicial only after carefully assessing whether there was a reasonable probability that the errors affected the outcome of the proceeding. *Id.* at 396-399.

2. There is no basis for a bypassing a prejudice inquiry when the ineffective assistance claim is that counsel failed to give a closing argument at a capital sentencing hearing. That claim is indistinguishable from any number of challenged attorney actions or omissions that may or may not be deficient or prejudicial depending on the facts of a particular case. "[I]t is well-settled that the decision to waive an opening or closing statement is a commonly adopted strategy" in order to prevent a damaging rebuttal from the prosecution. *Fox* v. *Ward*, 200 F.3d 1286, 1296 (10th Cir.), cert. denied, 531 U.S. 938 (2000). Both state and federal decisions have recognized that counsel may in a particular case forego a closing statement both in capital[4] and non-capital[5] proceedings without engaging in constitution-

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[4] See, *e.g.*, *Pickens* v. *Gibson*, 206 F.3d 988, 1001 (10th Cir. 2000) (guilt phase); *Fox* v. *Ward*, 200 F.3d at 1296 (guilt phase); *Moore* v. *Reynolds*, 153 F.3d 1086, 1104 (10th Cir. 1998) (penalty phase), cert. denied, 526 U.S. 1025 (1999); *Flamer* v. *Delaware*, 68 F.3d 710, 732 (3d Cir. 1995) (guilt phase), cert. denied, 516 U.S. 1088 (1996); *Lawhorn* v. *State*, 756 So. 2d 971, 986-988 (Ala. Crim. App. 1999) (penalty phase), cert. denied, 531 U.S. 835 (2000); *People* v. *Gaines*, 375 P.2d 296, 298 (Cal. 1962) (in bank) (guilt phase), cert. denied, 373 U.S. 928 (1963); *Dawson* v. *State*, 10 P.3d 49, 71 (Mont. 2000) (guilt phase), cert. denied, 121 S. Ct. 1372 (2001); *State* v. *Keith*, 684 N.E.2d 47, 67 (Ohio 1997) (penalty phase), cert. denied, 523 U.S. 1063 (1998); *State* v. *Burke*, 653 N.E.2d 242, 248 (Ohio 1995) (penalty phase), cert. denied, 517 U.S. 1112 (1996).

[5] See, *e.g.*, *United States* v. *Natanel*, 938 F.2d 302, 310 (1st Cir. 1991), cert. denied, 502 U.S. 1079 (1992); *United States ex rel.*

ally deficient performance. The fact that counsel in a particular case *reasonably* may waive a closing argument in furtherance of the defense is logically inconsistent with the conclusion that such conduct is invariably prejudicial in all cases. Indeed, courts in many cases have concluded that the absence of a closing argument was *not* prejudicial.[6]

For those reasons, a trial court cannot easily identify counsel's decision to waive a final argument as con-

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Spears v. *Johnson*, 463 F.2d 1024, 1026 (3d Cir. 1972); *United States ex rel. Taylor* v. *Barnett*, 109 F. Supp. 2d 911, 923-924 (N.D. Ill. 2000); *United States ex rel. Turner* v. *Cuyler*, 443 F. Supp. 263, 268 (E.D. Pa. 1977), aff'd, 595 F.2d 1215 (3d Cir. 1979); *Melvin* v. *Laird*, 365 F. Supp. 511, 521-522 (E.D.N.Y. 1973); *State* v. *Chee*, 680 P.2d 1232, 1234 (Ariz. Ct. App. 1984); *State* v. *Bojorquez*, 675 P.2d 1314, 1319 (Ariz. 1984) (in banc); *People* v. *Espinoza*, 99 Cal. App. 3d 44, 48 (Cal. Ct. App. 1979); *Shockley* v. *State*, 565 A.2d 1373, 1382 (Del. 1989); *People* v. *Conley*, 454 N.E.2d 1107, 1113 (Ill. App. Ct. 1983); *People* v. *Goodwin*, 322 N.E.2d 569, 573 (Ill. App. Ct. 1975); *Sparks* v. *State*, 499 N.E.2d 738, 743 (Ind. 1986); *State* v. *Johnson*, 551 So. 2d 14, 16 (La. Ct. App. 1989), writ denied, 556 So. 2d 56 (La. 1990); *Lowe* v. *State*, 779 S.W.2d 334, 335, 337-338 (Mo. Ct. App. 1989); *State* v. *Menn*, 668 S.W.2d 671, 673 (Tenn. Crim. App. 1984); *Salinas* v. *State*, 773 S.W.2d 779, 783 (Tex. Ct. App. 1989); *Medina* v. *State*, 626 S.W.2d 83, 86 (Tex. Ct. App. 1981); *Ransonette* v. *State*, 550 S.W.2d 36, 41 (Tex. Crim. App. 1976).

[6] See, e.g., *Pickens* v. *Gibson*, 206 F.3d at 1001 (capital case); *Moore* v. *Reynolds*, 153 F.3d at 1105 (capital case); *Flamer* v. *Delaware*, 68 F.3d at 732 (capital case); *Nutall* v. *Greer*, 764 F.2d 462, 466-468 (7th Cir. 1985); *United States ex rel. Taylor* v. *Barnett*, 109 F. Supp. 2d at 924; *Lawhorn* v. *State*, 756 So. 2d at 987-988 (capital case); *State* v. *Chee*, 680 P.2d at 1234; *People* v. *Gaines*, 375 P.2d at 298 (capital case); *Shockley* v. *State*, 565 A.2d at 1382; *People* v. *Miller*, 413 N.E.2d 143, 147 (Ill. App. Ct. 1980); *People* v. *Goodwin*, 322 N.E.2d at 574; *Sparks* v. *State*, 499 N.E.2d at 743; *State* v. *Johnson*, 551 So. 2d at 16; *State* v. *Robb*, 723 N.E.2d 1019, 1039 (Ohio 2000); *State* v. *Keith*, 684 N.E.2d at 68 (capital case); *Salinas* v. *State*, 773 S.W.2d at 783.

stitutionally deficient, or conclude that in all cases counsel would err in making the strategic judgment that closing argument would damage, rather than aid, the defense. Furthermore, because determining whether counsel's decision is objectively unreasonable under the first prong of *Strickland* requires a review of counsel's action in light of the entire record at trial (see, *e.g.*, Pet. App. 33-36), skipping the prejudice prong of *Strickland* would result in little (if any) added efficiency. See *Scarpa* v. *DuBois*, 38 F.3d 1, 14 (1st Cir. 1994) ("[O]nce it is necessary to examine the trial record in order to evaluate counsel's particular errors, resort to a *per se* presumption is no longer justified by the wish to avoid the cost of case-by-case litigation."), cert. denied, 513 U.S. 1129 (1995). Indeed, because it will "often" be "easier to dispose of an ineffective claim on the ground of lack of sufficient prejudice," *Strickland*, 446 U.S. at 697, an irrebuttable presumption of prejudice could frustrate the efficient adjudication of claims of ineffective assistance.[7]

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[7] The court of appeals opined that the jurors "must have" inferred that counsel's waiver of closing argument "was an implicit agreement [by counsel] that justice required that [respondent] be put to death." Pet. App. 36. Whether a jury is reasonably likely to draw that inference, however, necessarily depends on the facts and circumstances of a particular case, which is exactly the inquiry that *Strickland* compels. There is no basis for the court of appeals' apparent assumption that a jury will invariably draw that inference regardless of the underlying facts. For example, if counsel were to close merely "to ask the jurors to spare [the defendant's] life in the name of simple mercy," as suggested by the court of appeals (*ibid.*), a closing could well damage the defense by giving the prosecution the opportunity to give a fiery rebuttal that emphasizes to the jurors the heinousness of the crime or the *defendant's* lack of "simple mercy" as he killed his victims. Waiving a closing that invites such a response may be all the more warranted

C. The Court of Appeals Erred In Presuming Prejudice Under *United States* v. *Cronic* Because Counsel Did Not Entirely Fail To Present A Defense

1. In holding that "[respondent] need not show actual prejudice" from counsel's performance, the court of appeals reasoned that, "[e]ssentially, [respondent] did not have counsel during the sentencing phase of his trial," and thus the prosecution's request for the death penalty "was not subjected to 'meaningful adversarial testing.'" Pet. App. 37 (quoting *Cronic*, 466 U.S. at 656)). The Court in *Cronic*, *supra*, which was decided the same day as *Strickland*, observed that an accused has the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing" and that, "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." 466 U.S. at 656, 659.[8]

Cronic, however, did not purport to detract from *Strickland*'s insistence that a defendant claiming ineffective assistance from *attorney error* must show prejudice. Indeed, *Cronic* held that the court of appeals erred in presuming prejudice from the appointment of a

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if, as in this case (see pp. 24-25, *supra*), a closing statement would only repeat defense counsel's plea in his opening remarks.

[8] *Cronic*, 466 U.S. at 659, explained that prejudice was presumed in *Davis* v. *Alaska*, 415 U.S. 308 (1974), which reversed a conviction when the defense was prevented from cross-examining a government witness. In *Delaware* v. *Van Arsdall*, 475 U.S. 673, 683-684 (1986), however, this Court held that *Davis* did not establish a *per se* reversal rule and that the constitutionally improper denial of a defendant's opportunity to impeach a witness is subject to a harmless-error analysis under *Chapman* v. *California*, 386 U.S. 18 (1967).

young, inexperienced real-estate attorney 25 days before trial to represent a defendant charged with engaging in a complex check-kiting scheme. 466 U.S. at 663-666. The Court concluded that "[the defendant] can * * * make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel" which must "be evaluated under the standards enunciated in *Strickland* v. *Washington*." *Id.* at 666 & n.41. Thus, the Court concluded that "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." *Id.* at 659 n.26.

The Court's observation in *Cronic* that prejudice may be presumed "if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing," 466 U.S. at 659 (emphasis added), is best understood as referring to the possibility of a *total* failure by counsel to participate in the defense at trial or at sentencing. See, *e.g.*, *Tucker* v. *Day*, 969 F.2d 155, 159 (5th Cir. 1992) (counsel silent through entire sentencing hearing); *Harding* v. *Davis*, 878 F.2d 1341, 1345 (11th Cir. 1989) (counsel silent through entire trial, including when judge directed verdict against his client); *Martin* v. *Rose*, 744 F.2d 1245, 1247 (6th Cir. 1984) (counsel refused to participate in trial). In that instance, it may be readily apparent without a contextual analysis that the defendant has faced the prosecution as his adversary without the assistance of counsel. See *Nutall* v. *Greer*, 764 F.2d 462, 467 (7th Cir. 1985) ("If counsel had been totally passive, doing literally nothing in aid of his client's cause, we might infer prejudice without a particularized showing; no assistance at all could hardly be effective assistance.").

The courts of appeals have also extended *Cronic*'s presumption of prejudice when, during the trial or a critical stage of it, counsel is either physically absent or sleeping (and therefore unconscious). See *Burdine* v. *Johnson*, 262 F.3d 336, 349 (5th Cir. 2001) (en banc) ("the buried assumption [of *Strickland*] is that counsel is present and conscious to exercise judgment, calculation and instinct") (quoting *Tippins* v. *Walker*, 77 F.3d 682, 687 (2d Cir. 1996)), petition for cert. pending, No. 01-495.[9] Even assuming the validity of those decisions, there is no basis for further extending *Cronic*'s presumption of prejudice to claims of attorney error where counsel is present, conscious, and representing the defense. Such an expansion would divorce the presumptions noted in *Strickland* and *Cronic* from their policy justification, *i.e.*, that the denial of the right to counsel is traceable to the government, or that the court can easily identify the denial of the right to counsel and prejudice is so likely that a case-by-case examination of prejudice is not worth the effort. *Strickland*, 466 U.S. at 692; *Cronic*, 466 U.S. at 658.

[9] See, *e.g.*, *Burdine* v. *Johnson*, 262 F.3d at 348 ("counsel was unconscious, and hence absent, repeatedly throughout the guilt-innocence phase of [the defendant's] trial."); *Tippins* v. *Walker*, 77 F.3d at 687 (defendant "suffered prejudice, by presumption or otherwise," where counsel's sleeping rendered him "repeatedly unconscious at trial for periods of time in which defendant's interests were at stake"); *Green* v. *Arn*, 809 F.2d 1257, 1263 (6th Cir.) (counsel was absent from trial during the taking of evidence on the defendant's guilt), vacated on other grounds, 484 U.S. 806 (1987); *Siverson* v. *O'Leary*, 764 F.2d 1208, 1217 (7th Cir. 1985) (counsel was absent from courtroom during jury deliberations and return of verdict); *Javor* v. *United States*, 724 F.2d 831, 833 (9th Cir. 1984) (presuming prejudice pre-*Cronic* where counsel slept through substantial portions of trial).

Such an expansion also would lack a limiting principle. Virtually any claimed attorney error of omission or silence—*e.g.*, failure to conduct pretrial investigation, to file pre-trial motions, to make an opening or closing statement, to present evidence, or to cross-examine a key witness—could be characterized as a failure to subject the prosecution's case to a "meaningful adversarial testing" with respect to the matter at issue. *Cronic*, 466 U.S. at 659. And serious attorney missteps could be similarly characterized as a "constructive" denial of counsel at an important phase of the proceeding. See Pet. App. 32 and 36 ("[Respondent] may well have fared better if his counsel had left the courtroom entirely."). Such characterizations would swallow the rule of *Strickland* and later decisions applying that rule. See also *Scarpa* v. *DuBois*, 38 F.3d at 14 ("An overly generous reading of *Cronic* would do little more than replace case-by-case litigation over prejudice with case-by-case litigation over prejudice *per se*.").

2. A broad application of *Cronic*'s presumption of prejudice also would undermine society's strong interest in the finality of judgments. A retrial "imposes social costs, including the expenditure of time and resources for all concerned; the dispersal of witnesses and the erosion of witnesses' memories; and the occurrence of sundry other events that make obtaining a conviction more difficult on retrial." *Scarpa*, 38 F.3d at 15 (citing *Brecht* v. *Abrahamson*, 507 U.S. 619, 635-638 (1993)); see also *United States* v. *Mechanik*, 475 U.S. 66, 73 (1986); *Engle* v. *Isaac*, 456 U.S. 107, 126-128 (1982).

Those factors strongly cut against upsetting the outcome of a proceeding without a case-specific showing of prejudice except in those rare cases in which the defendant was denied the "'basic protections' without

which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.'" *Neder* v. *United States*, 527 U.S. 1, 8-9 (1999) (quoting *Rogers* v. *Clark*, 478 U.S. 570, 577-578 (1986)); *id.* at 8 (noting the "very limited class of cases" in which reversal is warranted without a showing of prejudice) (internal quotations marks omitted). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691; see *Hill* v. *Lockhart*, 474 U.S. at 58 ("requiring a showing of 'prejudice' from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel will serve the fundamental interest in the finality of guilty pleas").

3. Under a proper understanding of *Cronic*'s description of when prejudice can be presumed, the court of appeals misapplied *Cronic* because there was not a *total* denial of counsel at respondent's capital sentencing.[10]

Counsel had already presented mitigating evidence in the guilt phase about respondent's mental condition, and counsel relied on that evidence at sentencing pursuant to Tennessee's capital sentencing statute. See p. 3 & n.1, *supra*. Counsel's opening statement at sentencing advised the jury that it could consider the

[10] The court of appeals did not consider whether its application of the language in *Cronic* created a "new rule" under *Teague* v. *Lane*, 489 U.S. 288 (1989). Because petitioner did not argue in the petition that presuming prejudice under *Cronic* in this case would create a "new rule" under *Teague*, this Court need not consider the issue. See *Schiro* v. *Farley*, 510 U.S. 222, 229 (1994); *Godinez* v. *Moran*, 509 U.S. 389, 397 n.8 (1993).

mitigating evidence that was presented during the guilt phase. Pet. App. 114. That opening statement reminded the jurors of the defense theory during the guilt phase that respondent committed the murders "while [he] was under the influence of extreme mental or emotional disturbance," and that the judge would instruct them that they could consider respondent's mental capacity when determining whether to return a verdict sentencing respondent to death. *Id.* at 115. The statement also summarized for the jury the testimony of two defense experts, Dr. Matthew Jaremko and Dr. Lipman, who opined that respondent was suffering from "Vietnam Veteran's Stress Syndrome" and "Amphetamine Psychosis" as a result of drug abuse. *Ibid.* Counsel concluded his remarks by pleading for mercy and asking the jury to spare his client's life. *Id.* at 116-117.

Counsel at sentencing also elicited testimony on cross-examination of a prosecution witness that respondent had a record of distinguished military service. Trial Tr. 2123-2124. Counsel made several objections during the prosecution's presentation of aggravating factors, *id.* at 2129, 2130, and counsel obtained a court ruling excluding from the jury a series of gruesome photographs of the murder victims' dead bodies, *id.* at 2134-2143. In those circumstances, it can hardly be said that respondent's "counsel *entirely* fail[ed] to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659 (emphasis added). Accordingly, there is no basis for departing from *Strickland*'s requirement that errors by counsel must be prejudicial to justify relief under the Sixth Amendment. Unless respondent can show both that counsel's performance was deficient, *and* that there is a reason-

able probability that but for the lapse, the outcome would have been different, he is not entitled to relief.[11]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[11] Because this case arises on federal habeas corpus, the district court and court of appeals are also bound by 28 U.S.C. 2254(d)(1), which bars relief unless the state courts' adjudication of the claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." See *Williams* v. *Taylor*, 529 U.S. at 407.

Supreme Court, U.S.
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No. 01-400

In The Supreme Court Of The United States

RICKY BELL, Warden,

Petitioner,

v.

GARY BRADFORD CONE,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF OHIO AND 22 OTHER STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI* STATES

The 23 amici States write to urge the Court to reverse the judgment of the court of appeals. The States naturally have a strong interest in seeing that the final judgments of state courts in criminal cases are overturned only in the rarest of federal habeas cases, and that is particularly true where, as in this case, state appellate or post-conviction courts have made factual findings in the course of denying a prisoner's claims. The decision below granting federal habeas relief to a state prisoner chips away at the notion that federal courts should accord considerable deference to the judgments of state courts in criminal cases, and that decision runs counter to federal habeas principles that both the Congress and this Court have embraced.

And because state prisoners – like the respondent in this case – so often raise ineffective-assistance-of-counsel claims in their federal habeas petitions, the Court's decision in this case will affect a large number of the habeas cases to which state attorneys general must respond in the federal courts. The States earnestly seek guidance on the proper scope of the Sixth Amendment's protection, and we urge the Court to give that guidance in this case. The court below skipped over the *Strickland* prejudice inquiry, which we view as a critically important – and sensible – part of the proper analysis of Sixth Amendment claims, and the States therefore urge the Court to cabin more tightly the narrow class of cases in which the federal courts may simply presume prejudice in the way that the court of appeals did here, and we ask the Court to spell out the kind of objective criteria that the federal courts should apply in resolving ineffective-assistance claims like this one.

SUMMARY OF ARGUMENT

Though the state court of appeals held in this prisoner's case that "[n]o stone was left unturned" by state trial counsel, and though that court cited "overwhelming evidence" to support the jury's verdict finding the prisoner guilty and sentencing him to death, the Sixth Circuit has brushed aside the state court's findings and has vacated the death sentence. The federal court of appeals has done so even though Tennessee has sensibly argued that no matter whether defense counsel at trial performed splendidly or otherwise, the prisoner cannot show that he suffered any prejudice from his lawyer's alleged shortcomings. Lawyering praised in the state appellate court in this case has now been condemned by the Sixth Circuit, and the federal court of appeals has added the lawyer's conduct in this case to the formerly-narrow class of misconduct for which prejudice may be presumed.

The judgment of the court of appeals should be reversed. This Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), has long required that any convicted criminal defendant who alleges a Sixth Amendment violation must show a reasonable probability that the outcome of his trial or appeal would have been different had counsel handled the case in some other way. That "prejudice" requirement is a critical part of the analysis, and it should be skipped only in the rare case in which defense counsel has done *nothing* to help his client. That is not what happened here.

And once a state post-conviction or appellate court presented with a Sixth Amendment claim has examined and rejected any challenges to defense counsel's strategic choices and the propriety of them, the federal habeas courts ought not later second-guess the state court's factual findings. That is the thrust of AEDPA and of this Court's recent interpretation of key language in that statute. Deciding how a jury might

have reacted to additional evidence or argument had it been offered by defense counsel at trial is surely not easy, but the important state interest in the finality of convictions counsels against a whole new assessment by the federal courts of that fact-intensive issue once the state courts have decided that the extra effort by defense counsel would not have made any difference. AEDPA directs that the federal courts should stand aside in those cases, absent some objective evidence that the state court acted unreasonably in resolving the question.

Because the court of appeals in this case declined to give appropriate deference to state court findings about the work of this prisoner's trial lawyer, and because the court of appeals vacated the prisoner's death sentence without requiring him to show that the allegedly deficient performance of his trial lawyer had any effect on the outcome of his case, the court of appeals went beyond the limits set by this Court and by Congress on the federal courts' power to undo state-court convictions and sentences. The judgment should be reversed.

ARGUMENT

I. The Court Of Appeals Wrongly Granted Habeas Relief On The Respondent's Sixth Amendment Claim.

The Sixth Circuit erred in two critical ways in undoing the state court's decision in this case. First, the court of appeals failed to give to the state court findings the level of deference that they deserve under AEDPA. Second, the court of appeals improperly presumed that this prisoner was harmed by his trial lawyer's conduct without requiring him to show that his lawyer's strategic choices likely had an

effect on the jury's decision to recommend a death sentence for him.

A. The Court Misapplied The Relevant Test Under AEDPA.

The Tennessee Court of Criminal Appeals examined the respondent prisoner's post-conviction Sixth Amendment challenge to his trial lawyer's work, and that court found no support for the prisoner's claim that his trial lawyer should have handled the case differently. According to the Tennessee appellate court, defense counsel at trial (who testified at a post-conviction hearing in a Tennessee trial court about his strategic choices in this case) sensibly concluded that he need not present during the penalty phase the same testimony that he had offered during the guilt phase, and "nothing in the record" suggested that additional witnesses during the penalty phase "would have benefited the defense," according to the state court of appeals. Pet. App. 108-109.

As for the prisoner's post-conviction claim that his trial lawyer should not have waived his penalty-phase closing argument, the state appellate court found that defense counsel had made a reasonable choice in waiving argument. The lawyer had done so after hearing the prosecutor's "low-key" initial closing argument, and once defense counsel waived his argument, the prosecutor was thereby denied the opportunity to present to the jury the kind of "devastating" final closing argument for which he was well known. This was a "legitimate trial tactic" on defense counsel's part, according to the state court of appeals. Pet. App. 110.

Applying the familiar analysis from *Strickland v. Washington*, 466 U.S. 668 (1984), the state court of appeals not only examined whether defense counsel's performance was deficient, but also asked whether defense counsel's

alleged shortcomings actually had any effect on the outcome of the trial's penalty phase. They did not have that effect in this case, according to the state appellate court, because of the "overwhelming evidence" against the respondent at trial. Pet. App. 111.

The AEDPA statute directs the federal habeas courts to leave in place any state court judgment on the merits of a constitutional claim unless the state court decision "involved an unreasonable application of[] clearly established law." 28 U.S.C. 2254(d)(1). A state court judgment that is simply "incorrect" in its application of federal law ought not prompt a federal court to undo that judgment, *Williams v. Taylor*, 529 U.S. 362, 412 (2000), because "even if the federal habeas court concludes that the state court decision applied clearly established federal law incorrectly, relief is appropriate only if that application is also objectively unreasonable." *Penry v. Johnson*, 121 S. Ct. 1910, 1918 (2001).

The judgment of Tennessee's appellate court – resting as it did on this Court's *Strickland* decision, and simply applying the holding of that case to the particular facts of this one – should have survived AEDPA's deferential standard of review. The whole thrust of 28 U.S.C. 2254(d) is that prisoners who secure a state-court ruling on the merits of a constitutional claim should rarely be able to undo that ruling in a later federal habeas proceeding. State courts are well able to apply settled federal law to particular facts, and only when they do so in a way that is clearly at odds with essential principles announced by this Court may a federal habeas court second-guess a state court's conclusion. The court of appeals surely overstepped AEDPA's limits by vacating the death sentence in this case.

B. The Court Wrongly Omitted The *Strickland* Prejudice Inquiry.

The second question in the petition likewise identifies another error committed by the court of appeals. By skipping over the second prong of *Strickland* that requires a criminal defendant to "show that the deficient performance [of counsel] prejudiced the defense," *Strickland*, 466 U.S. at 687, the court of appeals expanded the narrow class of cases in which this Court has likewise skipped over that part of the ineffective-assistance test. And by doing so, the court of appeals effectively avoided wrestling with the factual findings and legal conclusions of Tennessee's court of criminal appeals, which had earlier rejected any suggestion that this prisoner was harmed by his lawyer's actions.

The presumption of prejudice that the court of appeals applied in this case should be reserved for those rare circumstances in which the defendant had no counsel at all, or where defense counsel had a conflict of interest. See *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000) (explaining that a "presumption of prejudice" applies when "the adversary process itself has been rendered presumptively unreliable" as a result of "the complete denial of counsel during a critical stage of a judicial proceeding") (quotations omitted); *Smith v. Robbins*, 528 U.S. 259, 287 (2000) (explaining that there are "three categories of cases" in which courts should "presume prejudice rather than require a defendant to demonstrate it": outright denial of counsel, state interference with counsel's assistance, and an actual conflict of interest on the part of defense counsel).

That kind of prejudice presumption first outlined in *United States v. Cronic*, 466 U.S. 648 (1984), should not be extended to cover cases like this one, in which defense counsel fought hard for the accused throughout the trial, making tactical choices that he felt were reasonable, and

which were always motivated by his efforts to serve the client well. The adversary process certainly did not break down in this case, and indeed defense counsel's tactical choice to waive closing argument – a choice that the state post-conviction court found sensible – was designed to thwart an expected strong closing argument by the prosecutor. That strikes us as the epitome of vigorous representation, not a breakdown in the adversarial process.

II. Too Often, The Federal Courts Simply Substitute Their Judgments For Those Of The State Courts On *Strickland*'s Second Prong In Capital Cases.

The States urge the Court to address in this case an issue on which we earnestly seek guidance: The kind of analysis that federal habeas courts ought to apply when weighing whether counsel's performance at the penalty phase of a capital trial has prejudiced the defendant.

In this case, the court of appeals should have asked whether defense counsel's tactical choices to omit some mitigating evidence and to skip presentation of a penalty-phase closing argument had some impact on the jury's verdict recommending a death sentence. The court of appeals did not examine the question, and that was wrong, for the "right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Cronic*, 466 U.S. at 658.

But to be sure, the task of deciding that question is a "difficult" one, requiring a reviewing court to assess "how jurors would have reacted to additional showings of mitigating factors" or arguments not presented. *Sawyer v. Whitley*, 505 U.S. 333, 346 (1992). The range of evidence that a jury may consider in the penalty phase of a capital trial is broad, and at that stage in particular, the variety of

reasonable choices that competent lawyers may make is perhaps at its greatest, with no two lawyers likely to agree entirely on the exact mix of witnesses and evidence that just may prompt a wavering juror to vote to spare the defendant's life.

The temptation for reviewing courts to second-guess the choice or choices made by defense counsel at the penalty phase is therefore high even when the courts ask – as they should – whether defense counsel's choices affected the trial's outcome. The frequency with which the Sixth Circuit alone has vacated death sentences based on alleged Sixth Amendment violations bears that out. See, e.g., *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001) (vacating death sentence because counsel should have investigated and presented evidence about the defendant's troubled childhood and low IQ); *Carter v. Bell*, 218 F.3d 581 (6th Cir. 2000) (vacating death sentence because counsel should have presented evidence about the defendant's violent upbringing, limited schooling and his positive relationships with family members); *Groseclose v. Bell*, 130 F.3d 1161 (6th Cir. 1997) (vacating death sentence because counsel should have presented evidence about the defendant's law-abiding life, his church activities and his military record), *cert. denied*, 523 U.S. 1132 (1998).

Yet the second part of *Strickland*'s test need not always prompt reviewing courts to second-guess the choices made by defense counsel at the penalty phase of a capital trial. See, e.g., *Burger v. Kemp*, 483 U.S. 776, 788 (1987) (leaving death sentence in place, even though defense counsel "offered no mitigating evidence at all"); *Darden v. Wainwright*, 477 U.S. 168, 184-86 (1986) (leaving death sentence in place, despite counsel's short preparation time and despite his tactical decision to rely simply on a plea for mercy from the defendant). The uncertainty of the federal courts about their duty to revisit state-court rulings like the

one in this case now prompts us to urge the Court to more clearly define the way in which courts should decide whether "counsel's errors were so serious as to deprive the defendant of a fair trial." *Strickland*, 466 U.S. at 687.

The very fact that different lawyers would almost inevitably make different choices in any given case ought to signal both state and federal courts to tread cautiously down the road that the court of appeals walked in this case. Convicted prisoners can almost always point to some piece of information about their often very troubled lives that defense counsel never shared with the jury, or a scientific analysis of a relevant physical or mental disorder about which the jury never heard, or a particular witness whose testimony might have swayed a juror had the witness been called at trial. The *Strickland* prejudice inquiry can very quickly turn into a free-wheeling analysis of defense counsel's every move at the mitigation hearing.

That ought not happen. AEDPA directs the federal courts to undo only the "unreasonable application" of federal law by state courts, or the "unreasonable determination of the facts" in those fora. 28 U.S.C. 2254(d). The inquiry should not be turned "into a subjective one." *Williams v. Taylor*, 529 U.S. at 410. And because there is little objective support for the view that a competent defense attorney necessarily *must* present some particular piece of evidence during the penalty phase, or that he or she *must* always do so in a particular way, we find little support for the kind of we-know-it-when-we-see-it approach to ineffective-assistance claims that some federal courts have applied in vacating death sentences.

Here, the state court of appeals rejected the prisoner's Sixth Amendment claim on both the deficient-performance and prejudice prongs of *Strickland*. Certainly the Sixth Circuit should have likewise examined both prongs, rather

than skipping over the latter. Had the court of appeals applied the right test, it would have found no objective basis for disagreeing with the state court's conclusions. No objective evidence points toward a reasonable probability that the jury (1) would have reached a different outcome had defense counsel introduced certain mitigating evidence during the penalty phase (particularly given that the lawyer had already introduced most of that evidence during the guilt phase), or (2) would have voted for a life sentence if defense counsel had opted to present a closing argument (and the jury had perhaps then heard the devastating closing argument that defense counsel expected the prosecutor to offer in response).

The analysis is not an easy one, but as things stand now, some federal courts continue to stray too far afield from the narrow confines that AEDPA and *Strickland*'s second prong give them in these Sixth Amendment cases. Federal courts ought not undo state-court convictions and sentences just because federal judges think that defense counsel could or should have done some things differently during the penalty phase of a capital trial. Any obscure fact about the defendant's personal troubles, and every seemingly unconnected facet of the defendant's childhood can later be seized on by the prisoner as the magic missing piece that would have led to a different trial outcome at the penalty phase, and all too often, the unpredictability of the outcome in federal habeas cases frustrates the parties (and perhaps the courts as well).

We think the better approach is one that focuses on any of several objective tests. The States earnestly strive to ensure fairness in both state-court trials and in their later post-conviction review proceedings. The more definite and objective is the federal-court process for reviewing state-court decisions rejecting ineffective-assistance claims, the

more all parties can feel that they have received a fair hearing on the merits of those claims.

Perhaps federal habeas review of ineffective assistance claims like this one should focus on whether defense counsel omitted mitigating evidence about the crime itself and about the defendant's reasons for committing the crime (as opposed to the lawyer's handling of more remote mitigating information such as a defendant's long-ago childhood troubles), or perhaps federal courts should ask whether defense counsel might have had any reasonable basis for handling the penalty phase as he or she did (doing so, as in this case, with the benefit of defense counsel's own post-trial explanation, where available, and relying heavily on the state courts' assessment of the reasonableness of counsel's strategy), or perhaps the courts should compare the jury's handling of the evidence presented in any given case with the outcomes in similar cases involving comparable types of available mitigating evidence.

In any event, the Sixth Circuit's approach in this case – "reject[ing] out of hand" the state appellate court's conclusions, *Cone v. Bell*, 243 F.3d 961, 979 (6th Cir. 2001) – cannot be squared with the deference owed those conclusions under AEDPA, or with the requirement that habeas relief should be granted on an ineffective-assistance claim only when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Williams v. Taylor*, 529 U.S. at 413-14, quoting *Strickland*, 466 U.S. at 694. Once Tennessee's courts found neither deficient performance by defense counsel nor prejudice from that performance, the federal habeas courts should have left the defendant's sentence in place, absent some kind of objective evidence that the lawyer's efforts deprived this prisoner of the fair trial to which he was entitled. That showing was surely lacking

here, and therefore the court of appeals erred in setting aside the jury's verdict.

CONCLUSION

The judgment of the court of appeals should be reversed.

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IN THE

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RICKY BELL, Warden,

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

In a case where counsel makes strategic choices (1) not to present additional mitigating evidence in the penalty phase, cumulative to the evidence already before the jury, and (2) not to make a closing argument, when that strategy precludes the prosecution from making an effective argument:

1. Does the general rule of *Strickland* v. *Washington* apply, requiring a showing of prejudice for relief on an ineffective assistance claim, or is prejudice presumed?

2. Was a "presumed" answer to Question 1 "clearly established" within the meaning of 28 U. S. C. § 2254(d)(1) as of 1988?

3. Was the state court's application of *Strickland* to the facts of this case reasonable, within the meaning of 28 U. S. C. § 2254(d)(1)?

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IN THE

Supreme Court of the United States

RICKY BELL, Warden,

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vs.

GARY BRADFORD CONE,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves the proper interpretation of Congress's landmark reform of habeas corpus law in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This law, if properly implemented, will greatly reduce unnecessary delay in

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

the enforcement of capital punishment and reduce the number of correct criminal judgments erroneously overturned on federal habeas. These changes would advance the rights of victims and society which CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On August 10, 1980, Gary Cone murdered Shipley O. Todd, age 93, and his wife Cleopatra Todd, age 79. *State* v. *Cone*, 665 S. W. 2d 87, 89-90 (Tenn. 1984). Over *twenty-one years* later, justice remains on hold, even though Cone's identity as the perpetrator has never been in doubt. See *id.*, at 90.

This senseless and brutal crime was the culmination of a series of crimes in which Cone endangered and injured numerous people. First, he robbed a jewelry store. Then he led police on a high-speed chase through mid-town Memphis and into a residential neighborhood. Then he shot a police officer. Then he shot a civilian, John Clark, who challenged him. Then he carjacked a car. Even though the owner of that car fled, Cone tried to shoot him as well. Fortunately, he was out of ammunition. He drew a pistol on Lucille Tuech when she refused to let him into her apartment. *Ibid.*

Cone broke into the Todds' home, beat them to death, and ransacked the house. He used the proceeds of this crime to make his escape to Florida. *Ibid.*

Cone made a mental defense in the guilt phase. The jury rejected it based on contrary expert testimony and evidence contradicting the factual basis of Cone's experts' diagnosis. *Id.*, at 91-92. Cone was sentenced to death, *id.*, at 90, and the Tennessee Supreme Court affirmed on direct appeal. *Id.*, at 92.

The state then provided extensive post-conviction review. The trial court held an evidentiary hearing to consider Cone's claims, including his ineffective assistance claim. Among other contentions, he claimed it was ineffective for trial counsel not to introduce mitigating evidence in the penalty phase and to

waive oral argument. See Findings of Fact and Conclusions of Law 4, J. A. 82.

The trial court credited the testimony of defense counsel that the additional testimony of family members "was contradictory and generally not helpful." *Id.*, at 5, J. A. 84. His strategy had been to get the mitigation evidence in during the guilt phase. *Ibid.* As noted *supra*, defense counsel did introduce the mental defense evidence in that phase. The court further credited the testimony of defense counsel that waiver of closing argument was a strategic choice, which precluded a final argument by a prosecutor with a "reputation for devastating closing arguments." *Ibid.* Applying *Strickland* v. *Washington*, 466 U. S. 668 (1984) and *Darden* v. *Wainwright*, 477 U. S. 168 (1986), the court found that counsel's performance was not deficient. *Id.*, at 5-6, J. A. 84. The state intermediate appellate court affirmed on similar reasoning, noting in addition, "the finding of guilt and the imposition of the death penalty were based upon the facts and the law—not by shortcomings of counsel." *Cone* v. *State*, 747 S. W. 2d 353, 357-358 (Tenn. Crim. App. 1987).

Extended litigation over a successive petition followed, ultimately concluding in a decision that all the claims in it were either previously determined or defaulted. *Cone* v. *State*, 927 S. W. 2d 579, 580, 582 (Tenn. Crim. App. 1995), cert. denied, 519 U. S. 934 (1996).

Cone filed the present petition in Federal District Court on July 1, 1997. *Cone* v. *Bell*, 243 F. 3d 961, 966 (CA6 2001). The District Court denied the writ and denied a certificate of appealability in an extensive opinion. The District Court agreed with the state courts that counsel had made a strategic decision not to introduce evidence he believed would hurt more than help, that the available mitigating evidence had been introduced in the guilt phase, and that there is no reasonable probability that the evidence not introduced would have changed the result. App. to Pet. for Cert. 77-80. Regarding waiver of closing argument, the District Court noted that the

prosecutor's closing remarks dealt only with the undisputed existence of aggravating circumstances, rather than an effective argument for the death penalty. Trial counsel therefore had a tactical basis for waiving argument and thereby precluding the prosecution's rebuttal, where he expected a far more effective argument to be made. Further, the District Court concluded that the state court's application of the law to the facts was reasonable. App. to Pet. for Cert. 81.

On appeal, the Sixth Circuit "reject[ed] out of hand" the unanimous conclusion of all the state and federal jurists who had examined the case to that point, that counsel had made a strategic choice. 243 F. 3d, at 979. The court found that a presumption of prejudice was raised and that "Cone need not show actual prejudice." *Ibid.*

On December 10, 2001, this Court granted the state's petition for certiorari.

SUMMARY OF ARGUMENT

The statute at the center of this case, 28 U. S. C. § 2254(d), was the centerpiece of the habeas reform portion of the Antiterrorism and Effective Death Penalty Act of 1996. It should be interpreted and applied in a way that will achieve the objectives of Congress: to speed up the processing of habeas cases and to greatly reduce, if not eliminate, the erroneous nullification of correct state judgments by the federal district and circuit courts.

The question of whether § 2254(d) bars habeas relief should be decided as a threshold matter, at the same time as any retroactivity question. In most cases, this resolution will make it unnecessary to address the underlying claim, reducing the delay in habeas cases.

The "unreasonable application" prong of a § 2254(d)(1) analysis need only consider whether the state court's application of the law to the facts reached a reasonable result. There

is no need to inquire whether the state court was reasonable in extending or not extending Supreme Court precedent to a new context. That issue is included in the analysis of what rule of law is "clearly established."

The state courts in the present case correctly recognized and applied the two-part test of *Strickland* v. *Washington*, including its requirement that the habeas petitioner affirmatively show prejudice. The Sixth Circuit's rule of presumed prejudice in the context of the present case is not "clearly established"; the contrary rule is clearly established.

Under the "unreasonable application" prong of § 2254(d)(1), the state court decision should stand if the outcome of applying the law to the facts of the case is "susceptible to debate among reasonable minds," the standard from *Butler* v. *McKellar*. This standard is consistent not only with the *Teague* line of cases, but also the qualified immunity cases and *United States* v. *Leon*. It is consistent with the interpretation of *Williams* v. *Taylor*, emphasizing the objective nature of the test but otherwise accepting it as a *Teague*-like inquiry.

ARGUMENT

I. The AEDPA should be construed and applied to simplify and streamline the resolution of habeas corpus cases.

The present case calls for the application of 28 U. S. C. § 2254(d).

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly estab-

lished Federal law, as determined by the Supreme Court of the United States; or

"(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

The Senate sponsor of the habeas reform portion of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 (AEDPA), called this the "single most important provision contained in the habeas reform proposal." See 141 Cong. Rec. 15,062, col. 3 (1995) (statement of Sen. Hatch). Within the limits of statutory language and binding precedent, the AEDPA should be construed and applied in a way to further its purpose.

The central purpose is abundantly clear from the debates. It is to expedite the resolution of habeas corpus petitions, particularly in capital cases. The supporters of reform invariably bolstered their arguments with horror stories of unconscionable delays. See *id.*, at 14,734 (statement of Sen. Feinstein); *id.*, at 15,062 (statement of Sen. Hatch); *id.*, at 15,019 (statement of Sen. Specter); *id.*, at 15,036-15,037 (statement of Sen. Nickles). Any interpretation which further delays, rather than expedites, habeas cases would be contrary to the clear purpose of the AEDPA.

In his argument for the new standard, Senator Hatch tied it specifically to this purpose:

"After all, State courts are constrained to uphold the Constitution and faithfully apply Federal law as well. There is simply no reason that Federal courts should have the ability to *virtually retry* cases that have been properly adjudicated by our State courts. There is no reason to allow Federal courts to do that." *Id.*, at 15,062 (emphasis added).

The provision's primary sponsor saw it as not only a limitation on relief but also as a limitation on relitigation. This is a rule about respecting the outcome of a previous adjudication, in the same category as res judicata and law of the case.

See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 946 (1998); see also *id.*, at 911-917. A substantial part of its value lies in protecting the party who has already prevailed on the merits from the burden and delay of having to litigate those merits over again. It is not enough for that party to win the second battle over the same turf; in most cases he should not have to fight the second battle at all.

A second purpose of this provision is to protect correct state court judgments from erroneous nullification. The problem is illustrated by the history of the Kentucky recidivist sentencing cases. In *Dunn* v. *Commonwealth*, 703 S. W. 2d 874, 876 (1985), the Kentucky Supreme Court considered the perennial problem of habitual criminals attacking the validity of their prior convictions and came up with a framework for adjudicating such claims. On federal habeas, the Sixth Circuit declared that the Kentucky system did "not comply with federal standards," *Dunn* v. *Simmons*, 877 F. 2d 1275, 1279 (CA6 1989), and this Court denied certiorari. 494 U. S. 1061 (1990). Years later, in a different case, this Court decided that the Kentucky system "*easily* passes constitutional muster." *Parke* v. *Raley*, 506 U. S. 20, 28 (1992) (emphasis added). The state court judgment in *Dunn* had been wrongly set aside. The state court was not only right, according to the final authority, it was right by a wide margin.

On the complex questions of constitutional criminal procedure, "right" and "wrong" in the abstract are very often debatable. We must operationally define the "right" answer as the answer given by the court of last resort.

"Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be

reversed. We are not final because we are infallible, but we are infallible only because we are final." *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring in the judgment).

Until this Court renders its answer, other courts will disagree. In the vast majority of cases, then, the real question is not what to do about "incorrect" state court judgments, cf. *Williams* v. *Taylor*, 529 U. S. 362, 411 (2000), but rather what to do with a state court judgment on an unresolved question with which the federal court might disagree.

From *Brown* v. *Allen* until the AEDPA, the answer was that the federal court simply substituted its own judgment for that of the state court, subject to limitations such as retroactivity and procedural default. See Scheidegger, *supra*, 98 Colum. L. Rev., at 933, 939-940. Congress quite deliberately changed that rule, creating "a new constraint." *Williams*, 529 U. S., at 412. The premise of the change was a renewed respect for state courts. See 141 Cong. Rec. 15,062, col. 2 (1995) (statement of Sen. Hatch). Their judgments are no longer to be brushed aside as virtual nullities. In developing the rules to implement this important reform, the federal courts should keep these twin objects in mind. An implementation which further delays habeas cases or which leaves correct state judgments exposed to erroneous nullification by the district and circuit courts would be contrary to the intent of Congress.

II. The AEDPA issue should be resolved first, as a "threshold matter."

Before we address the merits of the case, there is an important methodology question which has divided the circuits. Should a court addressing an issue subject to 28 U. S. C. § 2254(d)(1) decide whether petitioner's claim meets the criteria of that section first, or should it go to the merits of the underlying question first and only address the statutory standard if it disagrees with the state court's conclusion? Compare *Tran*

v. *Lindsey*, 212 F. 3d 1143, 1154-1155 (CA9 2000), cert. denied, 531 U. S. 944 (2000) (sometimes cited as "*Van Tran* v. *Lindsey*"), with *Bell* v. *Jarvis*, 236 F. 3d 149, 161-162 (CA4 2000) (en banc) (criticizing *Tran*). The difference between the two approaches may not matter much in this individual case, but multiplied over the tens of thousands of habeas cases per year, it is important. See U. S. Dept. of Justice, Bureau of Justice Statistics, Prisoner Petitions Filed in U. S. District Courts, 2000, with Trends 1980-2000, p. 2 (NCJ 189430 2001).

This Court has addressed the order of consideration of claims in several different contexts. Resolvability of a claim on one ground may make the answering of another question unnecessary, undesirable, improper, or even illegitimate. Jurisdiction goes to the head of the line, for without jurisdiction there is no legitimate authority to decide anything else. See *Steel Co.* v. *Citizens For Better Environment*, 523 U. S. 83, 94, 101-102 (1998). There is also a venerable rule that a case should be resolved on nonconstitutional grounds if the constitutional question, and hence potential or actual conflict with the legislative branch, can be avoided. See *Liverpool, New York, and Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885).

In habeas cases, the usual order is to decide "general prerequisites" such as custody, exhaustion, and procedural default first, see *Lambrix* v. *Singletary*, 520 U. S. 518, 524 (1997), although Congress has authorized an exception for the dismissal on the merits of meritless but unexhausted applications. See 28 U. S. C. § 2254(b)(2). The rule of *Teague* v. *Lane*, 489 U. S. 288 (1989) follows these determinations but precedes the underlying question. See *Lambrix*, *supra*, at 524; *Penry* v. *Lynaugh*, 492 U. S. 302, 329 (1989) ("threshold matter"). The first question in the present case is where the § 2254(d) issue is to be resolved.

There is a substantial overlap between the analysis needed to resolve a § 2254(d)(1) issue and a *Teague* issue. See *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000) (comparing

Teague "old rule" with § 2254(d)(1) "clearly established"). This overlap suggests an efficiency in addressing these two issues consecutively, before the underlying question. If the claim is barred by either or both rules, there will be no need to address the "merits" of the petitioner's claim.

The practical appeal of this approach is reinforced by both jurisprudential considerations and respect for the intent of Congress. The reason why *Teague* is a threshold matter is that announcing a new rule in a case where the rule does not affect the outcome would be an advisory opinion. See *Teague*, 489 U. S., at 316 (plurality opinion). That is, once a court decides that petitioner's proposed rule is new and does not qualify for an exception, the question of whether the rule ought to be adopted has no effect on the outcome of the case before the court. Courts have legitimate authority to make law, especially constitutional law, only in the course of deciding cases. See *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 177-178 (1803); *Muskrat* v. *United States*, 219 U. S. 346, 360-361 (1911); 1 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 2.13(b), p. 177 (2d ed. 1999). Once the court decides under *Teague* that the petitioner would not be entitled to relief even if he were right on the "merits," its legitimate precedent-making authority ends.

In this sense, § 2254(d)(1) is the same kind of rule as *Teague*. Where it applies, it precludes collateral relief regardless of the validity or invalidity of the underlying claim. This issue, like *Teague*, should therefore be addressed as a threshold matter.

Respect for the intent of Congress and the purpose of the AEDPA also favors this approach. The central purpose of the statute, voiced uniformly by its supporters, is to reduce the unconscionable delays in habeas corpus, particularly in capital cases. See *supra*, at 6. Specifically addressing § 2254(d), Senator Hatch, the provision's principal sponsor, noted "Federal habeas corpus proceedings have become, in effect, a second round of appeals in which convicted criminals are

afforded the opportunity to *relitigate* claims already considered and rejected by the state courts." 141 Cong. Rec. 15,062, col. 2 (1995) (emphasis added); see also K. Scheidegger, Overdue Process: A Study of Federal Habeas Corpus in Capital Cases and a Proposal for Reform 27-28 (1995), http://www.cjlf.org/publctns/Overdue/ODCover.htm.

In *Williams*, Justice Stevens acknowledged that "Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." 529 U. S., at 386 (opinion of Stevens, J.). "That acknowledgment is correct and significant to this case. It cannot be disputed that Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved." *Id.*, at 404 (majority opinion).

For § 2254(d)(1) to achieve its purpose, it is not enough to preclude relief; it must preclude relitigation. The state's primary interest in habeas reform was not to block relief in cases where it is warranted. Rather, it was to reduce the "burden of federal relitigation of state decisions . . . ." S. O'Connor, Local Control of Crime, Address to the Attorney General's Crime Summit 5 (Mar. 4. 1991), reprinted in Habeas Corpus Issues: Hearings before the House Subcommittee on Civil and Constitutional Rights, Serial No. 39, 102d Cong., 1st Sess., at 192, 197 (1991). In habeas, as in immunity, once the respondent is forced to litigate the question, most of the value of the protection is lost. Cf. *Mitchell* v. *Forsyth*, 472 U. S. 511, 526 (1985).

Determining whether another court's decision is within reason is typically much easier and faster than deciding the underlying question *de novo*. The doctrine of law of the case, as applied to decisions of coordinate courts, is analogous to § 2254(d). See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 914-916, 953 (1998). In that context, this Court admonished the courts of appeals not to "squander private and public resources." *Christianson* v. *Colt Industries Operating Corp.*, 486 U. S. 800,

818-819 (1988). Instead, once the second court finds the first court's decision "plausible, its . . . inquiry is at an end." *Id.*, at 819.

Penry v. *Johnson*, 532 U. S. 782, 150 L. Ed. 2d 9, 121 S. Ct. 1910 (2001), illustrates the application of § 2254(d)(1) as a threshold question. After discussing the differences between Penry's case and the precedent he was relying on, the Court held, "We need not and do not decide whether these differences affect the merits of Penry's Fifth Amendment claim. Rather, the question is whether the Texas court's decision was contrary to or an unreasonable application of our precedent. 28 U. S. C. § 2254(d)(1) (1994 ed., Supp. V). We think it was not." *Id.*, 150 L. Ed. 2d, at 23-24, 121 S. Ct., at 1919. An opinion resolving the merits of the Fifth Amendment claim would have required a more detailed analysis. Penry's habeas claim could be disposed of simply by noting that the differences from the precedent were sufficient that the state court's resolution of the claim was reasonable.

On Penry's second claim, the Court's holding that the state court decision was an unreasonable application also resolved the merits. See *id.*, 150 L. Ed. 2d, at 29-30, 121 S. Ct., at 1924. An unreasonable decision is necessarily a wrong decision. Cf. *Weeks* v. *Angelone*, 528 U. S. 225, 237 (2000) (correct decision is necessarily reasonable). In no case, then, is a two-step analysis necessary. In that vast majority of cases where the state court decision is reasonable, relief is denied. In those very few cases where it is unreasonable, and other prerequisites to reaching the merits have been satisfied, relief is granted.

Tran v. *Lindsey*, *supra*, offered three reasons for deciding the underlying question first. None is persuasive. First, *Tran* noted that *Weeks* v. *Angelone*, *supra*, decided first that the state court decision was correct, and only then addressed the AEDPA limitation. See *Weeks*, 528 U. S., at 237; *Tran*, 212 F. 3d, at 1155. The obvious reason is that *Williams* v. *Taylor*, *supra*, was pending but not decided at the time, and decision in this

order avoided the not-yet-resolved issue of the § 2254(d)(1) standard. That reason no longer applies.

The second reason was a reference to the qualified immunity cases. *Tran*, 212 F. 3d, at 1155. In this aspect, however, there is an important distinction between the qualified immunity cases and § 2254(d)(1). In civil rights suits alleging police misconduct, there is a need to establish a precedent to guide police actions in the future. In such suits, typically there is no prior court decision.[2] "The law might be deprived of this explanation [of the existence or nonexistence of a constitutional right] were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case." *Saucier* v. *Katz*, 533 U. S. 194, 150 L. Ed. 2d 272, 281, 121 S. Ct. 2151, 2156 (2001). However, in a case to which § 2254(d) applies, there has already been a ruling on the merits by a court of competent jurisdiction. Further, a ruling on the merits by a district or circuit court cannot set a precedent "clearly establish[ing]" the law for future state-court cases, as Congress has expressly limited the body of binding precedent to this Court's decisions. Compare 28 U. S. C. § 2254(d), with *United States* v. *Lanier*, 520 U. S. 259, 268 (1997) ("fair warning" in criminal civil rights cases not limited to this Court's precedents); *id.*, at 270-271 (similarity of civil and criminal standards).

Even so, *Tran* opined that a resolution of the merits would "provide[ ] guidance for state courts . . . ." 212 F. 3d, at 1155. In the federal courts of appeals, where most habeas cases will end, this "guidance" is not worth the delay, expense, and dubious legitimacy of writing opinions on points which do not affect the outcome. The opinions are not binding on state courts. See *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 58-59, n. 11 (1997); *id.*, at 66, n. 21; *Lockhart* v. *Fretwell*,

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2. If a state court actually had decided the merits adversely to the plaintiff, the suit would be precluded by collateral estoppel. See *Allen* v. *McCurry*, 449 U. S. 90, 104-105 (1980).

506 U. S. 364, 375-376 (1993) (Thomas, J., concurring). There is certainly no shortage of case law on constitutional criminal procedure. Questions bypassed on habeas can be considered in due course on direct review. See, *e.g.*, *Holland* v. *Illinois*, 493 U. S. 474, 486 (1990) (resolving issue left open in *Teague*). The federal courts of appeals "have no reason to presume state courts are in need of [their] guidance in interpreting and applying the controlling Supreme Court precedents." *Bell* v. *Jarvis*, 236 F. 3d 149, 162 (CA4 2000). *Tran*'s mandate to write pointless opinions sends an unfortunate and incorrect message that federal courts do not have enough to do. Cf. *Watt* v. *Alaska*, 451 U. S. 259, 274 (1981) (Stevens, J., concurring). It should be expressly disapproved. As a general rule, a habeas court should ask whether relief is precluded by § 2254(d) before addressing the merits of the underlying question. If relief is precluded, analysis can and should stop there.

III. There is no need for a separate "extension" analysis under the "unreasonable application" prong of § 2254(d)(1).

The "unreasonable application" prong of 28 U. S. C. § 2254(d)(1) generally involves the state court's application of "the correct legal rule from [Supreme Court] cases to the facts of a prisoner's case . . . ." See *Williams* v. *Taylor*, 529 U. S. 362, 406 (2000). *Williams* also noted that the Fourth Circuit, in *Green* v. *French*, 143 F. 3d 865 (1998) had held that "a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, *supra*, at 407. *Williams* expressly reserved the question whether *Green*'s " 'extension of legal principle' " analysis was correct. See *id.*, at 408-409. The plurality opinion in *Ramdass* v. *Angelone*, 530 U. S. 156, 166 (2000) included it in its

summary of *Williams*' holding, but *Penry* v. *Johnson*, 532 U. S. 782, 150 L. Ed. 2d 9, 22, 121 S. Ct. 1910, 1918 (2001) omitted it. The passing mention in dictum in *Ramdass* seems insufficient to resolve a question expressly reserved in *Williams*, and the question should be regarded as unresolved to this point. *Amicus* CJLF submits that the "extension of legal principle" prong of *Green* is unnecessary and would serve only to complicate the analysis.

Common to both the "contrary to" and "unreasonable application" prongs of § 2254(d)(1) is the requirement that the rule in question be "clearly established." For the most part, "whatever would qualify as an old rule under our *Teague* [v. *Lane*, 489 U. S. 288 (1989)] jurisprudence will constitute 'clearly established Federal law . . .' under § 2254(d)(1)." *Williams*, 529 U. S., at 412; see also *Sawyer* v. *Smith*, 497 U. S. 227, 236 (1990) (using "clearly established" in *Teague* context). This *Teague*-like inquiry includes the question of whether a preexisting precedent applies to the context of the present case.

In *Butler* v. *McKellar*, 494 U. S. 407 (1990), the state court was confronted with the question of whether the rule of *Edwards* v. *Arizona*, 451 U. S. 477 (1981) applied to a police request for waiver of *Miranda* rights for a different offense, when the suspect had already invoked his rights for the offense for which he had been arrested. See *Butler*, at 410-411. The question was debatable at the time of the state decision, *id.*, at 415, and the subsequent extension of *Edwards* to this context was therefore a "new rule." In § 2254(d)(1) terms, there was no "clearly established Federal law" governing the different-offense situation, although the law governing the same-offense situation had been clearly established in *Edwards*. Similarly, in *Caspari* v. *Bohlen*, 510 U. S. 383, 395 (1994), no Supreme Court precedent established that the Double Jeopardy Clause applied to noncapital sentencing, and the extension of *Bullington* v. *Missouri*, 451 U. S. 430 (1981) from the capital context to noncapital would have been a new rule. See also *Gilmore* v.

Taylor, 508 U. S. 333, 350 (1993) (extension of *Winship* line would have been a new rule).

Williams itself provides the example of a case granting relief. The Virginia Supreme Court had extended the rule of *Lockhart* v. *Fretwell*, 506 U. S. 364 (1993) to a new context where it should not apply. *Strickland* v. *Washington*, 466 U. S. 668, 694 (1984) had generally defined "prejudice" for ineffective assistance claims as a "reasonable probability that . . . the result of the proceeding would have been different." *Lockhart* had recognized an exception where the allegedly deficient performance "does not deprive the defendant of any substantive or procedural right to which the law entitles him," 506 U. S., at 372, an exception noted in *Strickland* itself. See 466 U. S., at 695 ("no entitlement to the luck of a lawless decisionmaker"). But *Williams* involved the jury's consideration of mitigating evidence, see 529 U. S., at 415, a procedural right to which Williams *was* entitled. Hence, the state court had both extended *Lockhart* to a context where it should not reach and failed to apply the general rule of *Strickland* in a context where it does apply. This error was "contrary to that clearly established federal law . . . ." *Williams*, *supra*, at 413 (opinion of O'Connor, J.). A separate "unreasonable application" inquiry was not necessary in *Williams*, and it would not be necessary in any case where the "extension of legal principle" analysis would properly result in a grant of relief. The statement of the *Williams* rule in *Penry*, 150 L. Ed. 2d, at 22, 121 S. Ct., at 1918, should be confirmed as a complete statement of the required analysis.

IV. The state courts recognized and applied the correct rule.

On Cone's motion for postconviction relief, the state trial court correctly recognized *Strickland* v. *Washington*, 466 U. S. 668 (1984) and the then-recent decision in *Darden* v. *Wainwright*, 477 U. S. 168 (1986), as establishing the governing

rule. See Findings of Fact and Conclusions of Law 5-6, J. A. 84. The court also referred to *Baxter* v. *Rose*, 523 S. W. 2d 930 (Tenn. 1975), a pre-*Strickland* case in which the Tennessee Supreme Court followed the tests adopted in the Sixth and D.C. Circuits. See *id.*, at 936. These pre-*Strickland* circuit cases are not significantly different from *Strickland* on the performance standard. See *Strickland*, *supra*, at 696-697. The trial court found that counsel's performance was not deficient. Findings, *supra*, at 6, J. A. 84. The court therefore did not need to address the prejudice component, see *Strickland*, *supra*, at 697, and it did not.

On appeal, the Tennessee Court of Criminal Appeals cited *Strickland* as the standard for the prejudice requirement. *Cone* v. *State*, 747 S. W. 2d 353, 356 (1987). The court found both that counsel was not deficient and that "the findings of guilt and the imposition of the death penalty were based upon the facts and the law—not by shortcomings of counsel." *Id.*, at 357-358. Although not expressly stated, it is evident that the state court believed that the *Strickland* prejudice requirement applies to the circumstances of the present case.

Strickland established a general rule that "actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." 466 U. S., at 693. Prejudice is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694. Exceptions to this requirement are few and far between. There is a small class of cases where a showing of a different outcome is insufficient. See *Nix* v. *Whiteside*, 475 U. S. 157, 175 (1986) (client perjury); *Lockhart* v. *Fretwell*, 506 U. S. 364, 370-371 (1993) (legal argument now known to be erroneous); *Strickland*, 466 U. S., at 695 (jury nullification). The common principle underlying these cases is that a client has no right to a lawyer who will cause the system to malfunction in his favor.

The other group of cases are those where a showing of a different result is not required. They include complete denial of counsel, conflict of interest, and state interference with counsel. *Strickland*, *supra*, at 692. Claims that the attorney has erred are different in kind, not just in degree, from those identified as exceptions to the general rule. The *Strickland* Court flatly refused to classify attorney errors "according to the likelihood of causing prejudice." *Id.*, at 693. *Darden* v. *Wainwright*, 477 U. S. 168, 184 (1986), the last pertinent Supreme Court precedent before the state court decision in this case, applied the two-part *Strickland* standard to a case where defense counsel did not present any evidence in mitigation other than "a simple plea for mercy from petitioner himself." *Id.*, at 186. Far from being "clearly established" that the prejudice prong of *Strickland* did not apply to an attorney's considered decision to not introduce mitigating evidence or make a closing argument, it appeared to be clearly established that the requirement *did* apply.

The status of a rule as not "clearly established" may be confirmed by later cases pointing the other direction. Cf. *Lambrix* v. *Singletary*, 520 U. S. 518, 536 (1997) (use of later case to confirm "new rule" status); *Caspari* v. *Bohlen*, 510 U. S. 383, 395 (1994) (later cases relevant to "limited extent"). *Smith* v. *Robbins*, 528 U. S. 259 (2000) presented a far stronger argument for presumed prejudice than does the present case. Robbins' appellate attorney did not make any argument at all on his behalf. See *id.*, at 265, 267. However important closing argument may be to a penalty trial, waiver of it does not come close to the complete absence of argument in *Robbins*. Yet the Court rejected a presumption of prejudice and required Robbins to prove it. *Id.*, at 286-287.

No clearly established rule makes an exception to *Strickland* under the facts of the present case. *Strickland*'s two-prong test is therefore the clearly established law for both the "contrary to" and "unreasonable application" prongs of § 2254(d)(1). The state court's decision is not contrary to *Strickland*. A federal

habeas court may not sustain a collateral attack on the state court judgment unless, applying *Strickland*'s rule to the facts of the present case, a decision against the defendant would be unreasonable.

V. If the application of the law to the facts is reasonably debatable, the state court decision stands.

"Habeas corpus 'is designed to guard against *extreme malfunctions* in the state criminal justice systems.' " *Brecht* v. *Abrahamson*, 507 U. S. 619, 634 (1993) (emphasis added) (quoting *Jackson* v. *Virginia*, 443 U. S. 307, 332, n. 5 (1979) (Stevens, J., concurring in the judgment)). This Court has said many times that habeas is different from an appeal from the judgment of conviction. See *id.*, at 633 (collecting cases). Its role is "secondary and limited." *Ibid.* (quoting *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983)). Section 2254(d) recognizes the limited purpose of habeas. When the state courts have considered the appellant's claim, recognized the correct rule of law, applied that rule to the facts of the case, and reached a conclusion within the range of reasonable disagreement, there has been no extreme malfunction of the system.

Although the present case has reached the Supreme Court, most cases do not. In most federal habeas cases, the final decision will be made by a three-judge panel of the court of appeals. When that panel disagrees with the decision of the state court, one of those decisions must be wrong, but no simple rule tells us which one. See *supra*, at 7. When a federal district or circuit court grants habeas relief to a state prisoner, it might be correcting an erroneous state decision, or it might be erroneously nullifying a correct decision. See *supra*, at 7. In 28 U. S. C. § 2254(d)(1), Congress sought to deal with this uncertainty, as well as to expedite the processing of habeas cases. See part I, *supra*.

As the *Williams* Court noted, "The term 'unreasonable' is no doubt difficult to define." *Williams* v. *Taylor*, 529 U. S.

362, 410 (2000). Some definition is needed, however, if the standard is going to be applied with any degree of uniformity. The definitions must be chosen with care, as some formulations in the courts of appeals, if taken literally, would come close to a judicial repeal of the statute. *Tran* v. *Lindsey*, 212 F. 3d 1143, 1153 (CA9 2000), for example, stated that a "firm conviction" that the state court decision was incorrect was sufficient for a collateral attack on a final judgment. Yet the federal court being "convinced" on the merits is exactly the standard the *Williams* majority rejected because it would have given "the 1996 amendment no effect whatsoever." 529 U. S., at 403. The addition of the adjective "firm" would give state judgments little additional protection. Cf. *Maynard* v. *Cartwright*, 486 U. S. 356, 364 (1988).

Congress deliberately chose the word "unreasonable," see *Williams*, *supra*, at 411, and "unreasonable" is a strong word. It means "[n]ot guided by reason; irrational or capricious." Black's Law Dictionary 1537 (7th ed. 1999). The *Williams* Court's rejection of a subjective standard for an objective one should not be misinterpreted as a watering down of this stringent limitation. "Objective legal reasonableness" is the criterion of the qualified immunity line of cases, see *Behrens* v. *Pelletier*, 516 U. S. 299, 306 (1996); *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982), yet that standard "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U. S. 335, 341 (1986). Similarly, § 2254(d) is a "new, *highly deferential* standard for evaluating state-court rulings." *Lindh* v. *Murphy*, 521 U. S. 320, 333, n. 7 (1997) (emphasis added).

There are other connections between § 2254(d) and the immunity cases. The statutory term "clearly established" appears to be lifted from them. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 947 (1998). Both rules are intended to enable courts to more quickly dispose of suits against govern-

ment officials. See *Behrens*, 516 U. S., at 305-306; *Williams*, 529 U. S., at 404; see also part I, *supra*.

United States v. *Leon*, 468 U. S. 897 (1984) similarly adopted an objective reasonableness test for suppression of evidence obtained with a search warrant, citing *Harlow*. *Id.*, at 922-923. Applying the general rule of probable cause to the specific facts of the individual case, the fruits of the search will not be suppressed if the evidence before the issuing magistrate is "sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause." *Id.*, at 926. There is no inconsistency between the objectivity requirement that *Williams* found in this statute and the "highly deferential" characterization of it in *Lindh*. In the Senate floor debate on § 2254(d), both the principal sponsor and the principal opponent referred to *Leon* in their discussion of the meaning of the "unreasonable application" prong. See 141 Cong. Rec. 15,064, col. 2 (1995) (statement of Sen. Hatch); *id.*, at 15,059, col. 3 (statement of Sen. Biden).

Saucier v. *Katz*, 533 U. S. 194, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001) illustrates the use of an objective standard of reasonableness in evaluating an application to specific facts of a general rule of law with a "sometimes 'hazy border.' " *Id.*, 150 L. Ed. 2d, at 284, 121 S. Ct., at 2158. "The question is what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards." *Id.*, 150 L. Ed. 2d, at 285, 121 S. Ct., at 2159. A court need not agree with that understanding; "substantial grounds" for the officer's conclusion are sufficient. *Id.*, 150 L. Ed. 2d, at 286, 121 S. Ct., at 2159.

Some applications are patently unreasonable even without a case on or near the point. See *United States* v. *Lanier*, 520 U. S. 259, 271 (1997) (selling children into slavery). However, the more general the standard and the further one gets from the core of constitutional rights, the broader the zone of reasonable disagreement.

In *Wright* v. *West*, 505 U. S. 277, 308 (1992), Justice Kennedy noted that, in the retroactivity cases, "The comity interest is not, however, in saying that since the question is close the state-court decision ought to be deemed correct because we are in no better position to judge. That would be the real thrust of a principle based on deference." Deference *is* the principle of the new statute, though. "[I]n both houses of Congress section 2254(d) 'was called a "deference" standard by every member who spoke on the question, opponents as well as supporters.' " *Matteo* v. *Superintendent*, 171 F. 3d 877, 890 (CA3 1999) (quoting Scheidegger, *supra*, 98 Colum. L. Rev., at 945); see 141 Cong. Rec. 15,057, col. 2 (1995) (statement of Sen. Biden); *id.*, at 15,062, col. 3 (statement of Sen. Hatch). Its real thrust is indeed that "State courts, in many respects, are just as good, if not better, than the Federal courts in these areas, just as good." 141 Cong. Rec. 15,062, col 2 (1995) (statement of Sen. Hatch). Congress's concern was primarily with the district and circuit courts rather than this Court, as indicated by the limitation on the definition of clearly established federal law, but the same standard must be applied in cases that arrive here through § 2254. This Court retains the authority to review state court decisions *de novo* under 28 U. S. C. § 1257.

Although *Williams* rejected reference to "all reasonable jurists" as the standard, 529 U. S., at 410, it did not reject the whole *Teague* line of cases as an analogous inquiry. Indeed, *Williams* refers to Justice O'Connor's clarification of the *Teague* line in *Wright* for its objective standard. See *ibid.* *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990) asked whether the question was "susceptible to debate among reasonable minds . . . ." That remains the standard under *Teague*, and it translates easily to the reasonableness inquiry required by the new statute, so long as it is understood that the inquiry is an objective one. It is consistent with *Harlow*, *Leon*, and their broad latitude for what a reasonable officer could have believed was the limit of his authority.

A standard of susceptibility to debate among reasonable minds is stringent enough, if properly applied, to achieve Congress's objectives, while still allowing relief for those "few indeed . . . whom society has grievously wronged . . . ." *Fay* v. *Noia*, 372 U. S. 391, 440-441 (1963), overruled on other grounds, *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991). The frontiers of constitutional criminal procedure have been pushed so far from the original Bill of Rights that any state decision that really did violate a fundamental right, see *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (Stevens, J., dissenting), would necessarily be outside the zone of reasonable debate. That zone consists entirely of non-fundamental, court-created rules of relatively recent vintage.

When the normal appellate process concludes with a decision within the zone "susceptible to debate among reasonable minds," it has "resulted in a ' "satisfactory conclusion." ' " See *Williams*, 529 U. S., at 410 (quoting *Wright* v. *West*, 505 U. S., at 287, in turn quoting *Brown* v. *Allen*, 344 U. S. 443, 463 (1953)). There has been no "extreme malfunction[ ]," see *supra*, at 19, which would warrant the drastic remedy of collateral attack on a final judgment. The federal district and circuit courts are not "higher" courts above the state courts in the appellate hierarchy. See Scheidegger, *supra*, 98 Colum. L. Rev., at 898-900. Congress's stringent limitation on habeas is consistent with its policy in other areas of preventing the lower federal courts from exercising *de facto* appellate jurisdiction over state courts, see *id.*, at 900-903, reserving that role to this Court alone. See *Darr* v. *Burford*, 339 U. S. 200, 217 (1950), overruled on other grounds, *Fay* v. *Noia*, 372 U. S., at 435.

Before *Williams*, the First Circuit interpreted the "unreasonable application" prong as authorizing relief when the state court decision "is outside the universe of plausible, credible outcomes." *O'Brien* v. *Dubois*, 145 F. 3d 16, 25 (1998). That court has since reaffirmed that the *O'Brien* formulation is "congruent" with *Williams* v. *Taylor*. See *Williams* v. *Mate-*

sanz, 230 F. 3d 421, 423 (2000). It is substantially the same as the *Butler* standard we propose.

The Second Circuit has stated that "to permit habeas relief . . . [s]ome increment of incorrectness beyond error is required," but "that increment need not be great; otherwise, habeas relief would be limited to state court decisions 'so far off the mark as to suggest judicial incompetence.' " *Francis S.* v. *Stone*, 221 F. 3d 100, 111 (2000). It is not entirely clear what this opinion means by "not great." If it means that Congress only nudged the benchmark a few millimeters from *de novo* relitigation, that interpretation cannot be squared with the language, history, or purpose of the statute. As noted, *supra*, at 20, Congress deliberately chose the strong word "unreasonable." Section 2254(d) was the centerpiece of a landmark reform intended to have a major impact on the way federal courts treat habeas cases. Cases in which a state court judgment is successfully collaterally attacked in federal court *should* be "few indeed," see *supra*, at 23, and there is no merit to an objection that the statute will actually limit relief to few cases.

There are reasons other than judicial incompetence why a decision may be so far off the mark as to be unreasonable. As *Williams* v. *Taylor* illustrates, a court's application of a rule may be skewed by a misunderstanding of the rule. "It is impossible to determine . . . the extent to which the Virginia Supreme Court's error with respect to its reading of *Lockhart* affected its ultimate finding that *Williams* suffered no prejudice." 529 U. S., at 414. In an overloaded judicial system, it is also possible that an unreasonable application may result from a failure to give the case sufficient attention. Justice Jackson noted nearly half a century ago that "floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts," and "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones." *Brown* v. *Allen*, 344 U. S., at 536-537 (opinion concurring in the judgment). The situation has certainly not improved since then. If the inundated state court overlooks the needle in the haystack,

see *id.*, at 537, despite the undisputable merit of the petition, then § 2254(d)(1) still permits federal habeas relief.

In the present case, the Sixth Circuit made only a terse mention of § 2254(d)(1). *Cone* v. *Bell*, 243 F. 3d 961, 979 (2001). This mention followed the court's novel and probably erroneous expansion of the "presumed prejudice" cases. See *supra*, part IV. The question at this point should have been whether, applying both prongs of the clearly established *Strickland* rule to the facts of this case, a decision against the petitioner was unreasonable, *i.e.*, whether his entitlement to relief was so clear as to not be "susceptible to debate among reasonable minds." For the reasons stated in the state's brief and the briefs of the other *amici*, the state court decision was reasonable and § 2254(d)(1) precludes collateral attack on that judgment.

CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit should be reversed.

January, 2002

Respectfully submitted,

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IN THE

Supreme Court of the United States

RICKY BELL, WARDEN,
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v.

GARY BRADFORD CONE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief is filed on behalf of the National Association of Criminal Defense Lawyers as *amicus curiae* in support of respondent Gary Bradford Cone, with the written consent of the parties.[1]

[1] As required by Rule 37.6 of this Court, *amicus curiae* submits that no party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. In keeping with that stated mission, NACDL is dedicated to the preservation and improvement of our adversary system of justice. NACDL frequently files briefs before this Court in cases implicating its substantial interest in defending standards of professional advocacy and upholding the constitutional commitment to the effective assistance of counsel. *See, e.g., Williams v. Taylor*, 529 U.S. 362 (2000); *Smith v. Robbins*, 528 U.S. 259 (2000).

This brief, like the brief of the United States as amicus for petitioner, is limited to the ineffective assistance issue raised in question two of petitioner's brief.

SUMMARY OF ARGUMENT

"The right to the effective assistance of counsel is [] the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984). The prosecution's argument at the penalty phase of respondent's trial – that Gary Cone should die – was never subjected to that "meaningful adversarial testing." As a result, there can be

no confidence in the fairness or reliability of the sentencing proceeding. *Id.* at 654-56. The Sixth Amendment does not permit that outcome to stand – not in any case, and certainly not in a capital case, where concerns for fairness and reliability are at a premium.

Petitioner's first line of attack on this straightforward position is to minimize the nature of counsel's nonperformance at the penalty proceeding. But this is not a case about an isolated attorney error, or even a series of discrete attorney missteps. This is a case about an attorney's complete failure to answer the State's argument for death with an affirmative argument for life – to forgo both of the primary tools of advocacy at a penalty proceeding, *i.e.*, presentation of mitigating evidence and closing argument, and to create for the jury what must have been an indelible impression of a client so deserving of the death sentence that even his own lawyer is left without any response to the prosecution. No amount of disaggregating by petitioner can disguise the combined effect of counsel's complete abdication here.

Petitioner's fall-back position is that *Cronic* does not, or at least should not, mean what it says. We disagree. *Cronic* is perfectly clear about the rule it establishes: When counsel ceases to function as a meaningful adversary of the state, it is as though counsel is absent altogether, and there is no need for any further inquiry into prejudice or specific harm to make out a violation of the Sixth Amendment. And nothing about the *Cronic* principle has proved unwise or unworkable in practice. In the rare instances in which the lower courts have resorted to it, the *Cronic* standard has operated just as it was intended, to prevent the fairness and legitimacy of criminal proceedings from being undermined by breakdowns of the adversarial process.

ARGUMENT

I. COUNSEL ENTIRELY ABDICATED HIS BASIC ADVERSARIAL RESPONSIBILITY IN RESPONDENT'S CAPITAL SENTENCING HEARING.

The question in this case is whether respondent's counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing," *United States v. Cronic*, 466 U.S. 648, 659 (1984), in the capital sentencing proceeding that resulted in respondent's death sentence. The answer is yes. Counsel entirely abdicated his most basic duty as an advocate in the penalty proceeding – to make an affirmative case for a life sentence to counter the prosecution's case for death. In fact, counsel literally stood silent in response to the prosecution's case for imposition of the death sentence, leaving the jury with the inescapable impression that there was no argument at all to be made for sparing respondent's life. That constitutes a breach of counsel's adversarial responsibilities of the most fundamental kind.[2]

A. Counsel's Fundamental Duty In A Capital Sentencing Hearing Is To Make An Affirmative Case For A Life Sentence.

The question for the jury in a capital sentencing proceeding is which sentence – life or death – best "reflect[s] a reasoned *moral* response to the defendant's background, character, and crime." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (emphasis in original) (internal quotation marks omitted).

[2] This brief does not address separately the State's contention that 28 U.S.C. § 2254(d)(1) barred the court below from vacating respondent's death sentence. As respondent explains, whether 28 U.S.C. § 2254(d)(1) precludes relief in this case turns entirely on the merits of the Sixth Circuit's conclusion that *United States v. Cronic* provides the governing framework for respondent's ineffective assistance claim. That conclusion is correct for the reasons we explain here.

The objective of defense counsel can be stated in stark terms: "The goal at the sentencing phase is to help the jury see the client as someone they do not want to kill." American Bar Ass'n, *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* ("*ABA Guidelines*"), 11.8 commentary (1989). After all, "[o]nce the defendant has been found guilty of a capital crime, a life sentence is counsel's only remaining advocacy goal." Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 318 (1983). And because the jury – having already found the defendant guilty of a capital crime – is generally predisposed to imposing the death sentence, it is up to counsel to present an affirmative case to the jury for sparing the defendant's life. *See* Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. Ill. L. Rev. 323, 341 ("At the sentencing stage, the defendant, having been convicted of a capital offense, usually faces a sentencer already inclined towards imposing the death penalty unless the defense provides it with a reason not to").[3]

The twin pillars of counsel's affirmative case for a life sentence are interrelated. The first entails the introduction of mitigating evidence about the defendant's "background, character, and crime," *Penry*, 492 U.S. at 319, as a counterweight to the aggravating circumstances presented by the prosecution. The Constitution of course prohibits any limitation on the jury's consideration of mitigating evidence about a capital defendant. *See Eddings v. Oklahoma*, 455 U.S.

[3] *See also* Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1, 12 (1992) ("The data suggest that the sentencing phase of a capital trial commences with a substantial bias in favor of death."); Tennessee Ass'n of Criminal Def. Lawyers, *Tools for the Ultimate Trial: The TACDL Death Penalty Defense Manual*, 14.13 (1992) ("After considering all the gruesome evidence of guilt, the jurors often need no additional reasons to impose death.").

104, 113-14 (1982); *Lockett v. Ohio*, 438 U.S. 568, 604 (1978) (plurality). And it is generally accepted in the capital defense bar "that the presentation of mitigation in the penalty phase is of overwhelming importance." Craig Haney, *Taking Capital Jury Seriously*, 70 Ind. L.J. 1223, 1227 (1995); *see ABA Guidelines*, *supra*, 11.8.2(D) & 11.8.6(C) (describing counsel's obligation to "ensure that all reasonably available mitigating and favorable information . . . is presented to the jury in the most effective possible way" and to "consider all potential methods of offering mitigating evidence to the sentencing entity"). The presentation of a case in mitigation assumes special importance where, as here, the jury is instructed that if the aggravating circumstances "are not outweighed by any mitigating circumstances," "the sentence *shall* be death." J.A. 57 (emphasis added); *see, e.g., Hall v. Washington*, 106 F.3d 742, 752 (7th Cir. 1997) ("Without a reasonable showing of mitigation by the defense, the court had no choice: under the Illinois death penalty scheme, if no sufficient mitigating factors are found, 'the court *shall* sentence the defendant to death.'").

The second basic element of counsel's affirmative case for a life sentence is the closing argument to the jury. The "closing arguments of counsel are a critical stage of the penalty trial. For defense counsel, there may be no more awesome task than delivering a plea for life." California Death Penalty Defense Manual, Vol. 2, H-225 (1986). Closing argument represents counsel's sole opportunity to explain to the jury why, in view of the various mitigating and aggravating evidence presented to it, the appropriate "reasoned *moral* response" in the circumstances is to show mercy. *Penry*, 492 U.S. at 319. The principal objective is to "humanize" the defendant, by marshaling the mitigating evidence and weaving it into a coherent explanation of how an individual whose life is worth sparing could commit an offense so grave. *See TACDL Death Penalty Defense Manual*, *supra*, at 14.94.

Closing argument in this sense works hand-in-hand with the presentation of mitigating evidence, and "can be the single most important part of a capital murder trial." Roy Brasfield Herron, *Defending Life in Tennessee Death Penalty Cases*, 51 Tenn. L. Rev. 681, 758 (1984).

Because the jury's decision is based ultimately on an indefinite "moral response" to the defendant's circumstances rather than on an objective finding of determinate fact, a skillful use of mitigating evidence and closing argument can overcome even the most substantial case in aggravation. "In fact, most experienced capital defense attorneys are able to cite cases in which the defendant's life was spared despite overwhelming evidence of aggravating circumstances." White, *supra*, at 365.[4] As is by now well established, however, the quality of advocacy in capital cases represents one of the "principal failings of the capital punishment systems in the states today," and too often falls far short of the ideal. American Bar Ass'n, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 Am. L. Rev. 1, 16 (1990); *see* Stephen B. Bright, *Counsel for the Poor: The Death Penalty Not for the Worst Crimes But for the*

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[4] Consider, for instance, the following cases where Tennessee juries found that the State had established multiple aggravating circumstances yet were persuaded to return life sentences. *State v. Harris*, 989 S.W.2d 307 (Tenn. Crim. App. 1999) (victim was kidnapped, shot, and mutilated); *State v. Julian*, 1997 Tenn. Crim. App. LEXIS 702 (1997) (rape, kidnapping, and murder of a young girl); *see also Cox v. State*, 880 S.W.2d 713 (Tenn. Crim. App. 1994); *State v. Bibbs*, 806 S.W.2d 786 (Tenn. Crim. App. 1991). The point is further confirmed by instances in which a jury is persuaded to return a life sentence in the retrial of a defendant who was previously sentenced to death. *See, e.g.*, Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 Rutgers L. Rev. 281, 331-33 (1991); White, *supra*, at 324-26 (discussing case in which "[i]t took the second jury almost exactly the same amount of time to reach a unanimous sentence of life as it had taken the first jury to sentence the defendant to death).

Worst Lawyer, 103 Yale L.J. 1835, 1841 (1994).

B. Counsel Made No Case For A Life Sentence In Response To The State's Case For Death.

This is not a case in which counsel's performance of his basic responsibility at sentencing falls somewhat short of the ideal. This case is in an altogether different category: counsel literally made *no* affirmative argument for a life sentence in response to the prosecution's case for death.

To make its case at sentencing, the State presented the testimony of a number of witnesses as to the existence of four statutory aggravating factors. After the State completed its proof of the four aggravating circumstances, counsel for respondent introduced no evidence – none at all – in mitigation, even though he had "plenty of mitigating evidence at his fingertips." Pet. App. 35. Then, the State made its closing argument, in which it reviewed "the proof as relates to aggravating circumstances and mitigating circumstances," reiterated the four aggravating factors, stated that those factors had "been proven . . . beyond a reasonable doubt and to a moral certainty," and urged that "the aggravating circumstances outweigh the mitigating circumstances" and therefore compelled imposition of a death sentence. J.A. 50-52. Counsel for respondent made no argument in response, stating instead only that he "waive[d] final argument." *Id.* at 52.

The jury, in short, was presented with no affirmative argument for a life sentence to counter the State's argument for death. In fact, given the sequence of events, counsel did more than fail to make an affirmative argument for life. Through his complete silence following the close of the State's case, counsel gave the jury the impression that, after hearing the strength of the State's case for the death sentence, he had no choice but to acquiesce. Pet. App. 36; *see Smith v. Stewart*, 140 F.3d 1263, 1270 (9th Cir. 1998) ("fail-

ure to offer evidence or make argument amounts to a concession that the death penalty should be imposed, and an abandonment of the client to that fate").

Nothing else about counsel's actions at the sentencing proceeding can compensate for this fundamental failing. Though counsel briefly cross-examined one of the State's witnesses and successfully objected to the introduction of one of the State's exhibits, neither of those defensive efforts went toward explaining to the jury why they should spare respondent's life. Nor can counsel's brief opening statement, made before the State presented its case, carry the weight petitioner assigns it. To be sure, that statement did refer to testimony in the *guilt* phase concerning respondent's drug abuse and mental condition. But because counsel presented no evidence and waived closing argument, there was no subsequent reference to respondent's mental state *after* the jury had been confronted with the state's case for death, and thus no effort to explain how the guilt phase evidence could justify a life sentence in the face of the state's unrebutted argument to the contrary.

Indeed, given the failure to introduce evidence or to make a closing argument, there was no occasion to explain to the jury why that evidence – which the jury already had rejected in the course of convicting respondent – should be considered mitigating at all. *See Penry*, 492 U.S. at 320 ("The jury was never instructed that it could consider the evidence offered by Penry as *mitigating* evidence and that it could give mitigating effect to that evidence in imposing sentence."). Nor was there any reason to assume that the lay jury could find its way to the mitigating properties of the evidence on its own. Such an assumption is always unwarranted. *See Gregg v. Georgia*, 428 U.S. 153, 192 (1976) (plurality) ("Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are

given."). But it is especially dangerous when, as here, the evidence goes to mental or emotional difficulties. As this Court has recognized, such evidence is a "two-edged sword," likely to be perceived by a sentencing jury as *aggravating* unless its mitigating potential is explained. *Penry*, 492 U.S. at 324 (evidence of mental difficulties can "diminish [] blameworthiness for [a] crime even as it indicates that there is a probability that [the defendant] will be dangerous in the future").

The irreducible minimum of meaningful advocacy by defense counsel in a capital sentencing hearing is this: "A true advocate cannot permit a capital case to go to the sentencer on the prosecution's one-sided portrayal alone and claim to be rendering effective assistance." Goodpaster, *supra*, at 335-36. That is precisely what happened in this case.

II. *CRONIC* SETS THE APPROPRIATE STANDARD WHEN COUNSEL FAILS TO SUBJECT THE STATE'S CASE FOR DEATH TO MEANINGFUL ADVERSARIAL TESTING.

A. This Case Is Governed By The *Cronic* Standard For Breakdowns Of The Adversarial Process Rather Than The *Strickland* Standard For Specific Attorney Errors.

1. In *United States v. Cronic*, 466 U.S. 648, 654-56 (1984), this Court established that the right to counsel protected by the Sixth Amendment entails more than mere appointment, or even presence, of counsel. Instead, the Sixth Amendment guarantees the *effective* assistance of counsel – not as an end in itself, but as a means of vindicating the underlying "right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Id.* at 656. It follows, the Court held, that when that "adversarial testing" does not occur, the Sixth Amendment is

violated. *Id.* at 656-57. "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* at 659.

This conclusion, sometimes referred to as the "*Cronic* presumption" of ineffective assistance, is perfectly straightforward. That the assistance of counsel is absolutely essential to the functioning of a fair trial is by now well understood. *See id.* at 653-57; *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). So is the principle that actual denial of counsel at a critical stage of trial is a *per se* Sixth Amendment violation, without the necessity for any further inquiry into prejudice or other harm to the defendant. *See Cronic*, 466 U.S. at 659 & n.25. *Cronic* simply applies the same principle to the constructive denial of counsel that occurs when a lawyer so thoroughly abdicates his responsibility that an "actual breakdown of the adversarial process" results. *Id.* at 657; *see Strickland*, 466 U.S. at 692 (*Cronic* establishes that "[a]ctual or constructive denial of the assistance of counsel altogether" constitutes Sixth Amendment error).

The *Cronic* standard, of course, applies only rarely. But this is the rare case that squarely implicates *Cronic*. At the most critical stage of respondent's trial – the stage that would determine whether respondent lived or died – counsel let the State's case for death go unanswered. After the prosecution put on evidence of aggravating factors and argued for death, counsel simply sat silent. No other aspect of counsel's performance – not evidence introduced at the guilt phase of trial, not counsel's opening statement – can cure this central defect in the proceedings. *See supra* at 9. Counsel's failure to respond to the prosecution's case with either mitigating evidence or a closing argument deprived the penalty phase of the "meaningful adversarial testing" that would have made it presumptively reliable, *see Cronic*, 466 U.S. at

659, and constitutes a Sixth Amendment violation under the *Cronic* standard.

2. Though this case seems clearly to fit within the terms of *Cronic*, the state and its amicus argue that *Strickland v. Washington*, rather than *Cronic*, should govern respondent's ineffective assistance claim. But the familiar *Strickland* standard – requiring a showing by defendant of both deficiency and prejudice, 466 U.S. at 687 – is designed for a very different class of claims.

The vast majority of ineffective assistance claims do not – and could not – allege that counsel has failed to subject the state's case to any meaningful adversarial testing, as is required to make out a *Cronic* violation. Instead, they fall into what *Cronic* itself recognized as an entirely distinct category of ineffective assistance claims: those focusing on "specific errors and omissions" that counsel may have made in the course of providing adversarial representation. 466 U.S. at 657 n.20, 656. It is these claims of discrete attorney errors, *Cronic* makes clear, rather than claims of more thoroughgoing adversarial breakdown, that are subject to the standard announced in *Strickland*. 466 U.S. at 657 n.20, 666-67 & n.41 (remanding for inquiry under *Strickland*). And *Strickland* works in tandem with *Cronic*, its companion case, to solidify the distinction between attorney error cases, on the one hand, and those involving *Cronic*-style constructive denial of counsel, on the other. 466 U.S. at 692-93. *See also Roe v. Flores-Ortega*, 528 U.S. 470, 482-83 (2000) (distinguishing between *Strickland* "cases involving mere 'attorney error'" and *Cronic* cases involving actual or constructive denial of counsel).

Respondent in this case is not alleging the kind of specific attorney error or omission that is cognizable under *Strickland*. Both the State and its amicus proceed as though he were, breaking counsel's nonperformance at sentencing

into constituent parts and treating his failure to present mitigating evidence and his failure to make a closing argument as isolated and discrete attorney errors. *See* Pet. Br. at 27, 31; U.S. Br. at 16, 17. That is a critical category mistake, and it goes directly to the heart of this case. The problem here is not that counsel made a series of specific errors, any or all of which constituted ineffective assistance under *Strickland*. It is that the combined effect of counsel's failings – a combined effect that neither the state nor the United States ever once addresses – was to leave the State's case for death, once made by the prosecution, entirely untested by the defense. *See supra* at 8-10. This is precisely the kind of adversarial breakdown that both *Cronic* and *Strickland* reserve for evaluation under the *Cronic* standard.

3. None of this Court's cases suggests that respondent's claim must be evaluated under *Strickland* rather than *Cronic*. Contrary to the suggestion of both petitioner and the United States, for instance, this Court never has held that the *Cronic* standard applies only when the *government* interferes with the performance of counsel (apart, apparently, from a somewhat *ad hoc* exception for conflict-of-interest cases). Pet. Br. at 36, U.S. Br. at 12-13. In fact, *Cronic* itself expressly rejects the position that its standard should be reserved for cases in which "external constraints" produce a breakdown in the adversarial process: "[T]hat the accused can attribute a deficiency in his representation to a source external to trial counsel does not make it any more or less likely that he received the type of trial envisioned by the Sixth Amendment . . . ." 466 U.S. at 662 n.31.

There is no reason to think that *Strickland*, issued the same day, takes a different view of the scope of the *Cronic* rule. On the contrary, *Strickland* excludes from its own ambit not only cases of state interference with counsel but also those of "constructive denial" of counsel's assistance, 466 U.S. at 692, thus leaving for *Cronic* cases in which a law-

yer's own failings result in the absence of any meaningful adversarial testing. *See also id.* at 703 n.2 (opinion of Brennan, J.) ("counsel's incompetence can be so serious that it rises to the level of a constructive denial of counsel" evaluated under *Cronic*); *Flores-Ortega*, 528 U.S. at 481-82 (whether *Strickland* or *Cronic* applies to claims involving counsel's performance turns on "magnitude of the deprivation of the right to effective assistance"); *Lockhart v. Fretwell*, 506 U.S. 364, 386 (Stevens, J., dissenting) (noting that there "may be exceptional cases in which counsel's performance falls so grievously far below acceptable standards" that *Cronic* applies).

Nor do any of the Court's prior decisions regarding ineffective assistance of counsel during penalty phase proceedings control this case. *See* U.S. Br. at 16-17. The cases relied on by petitioner and his amicus all involve the kind of "specific errors and omissions," 466 U.S. at 657 n.20, that fall naturally within the purview of *Strickland*. *See Strickland*, 466 U.S. at 675 (failure to include particular mitigating evidence in penalty phase presentation); *Darden v. Wainwright*, 477 U.S. 168, 186 (1986) (limiting penalty phase presentation to "simple plea for mercy from petitioner himself"); *Burger v. Kemp*, 483 U.S. 776, 788 (1987) (failure to develop and introduce mitigation evidence); *Williams v. Taylor*, 529 U.S. 362, 395-99 (2000) (failure to investigate and include particular mitigating evidence). None presented the Court with the combined effect on a penalty proceeding of defense counsel's failure to present any mitigating evidence and waiver of closing argument – *i.e.*, a complete failure to answer the prosecution's case for death – and in none, therefore, did the Court even have occasion to consider the potential application of *Cronic*.

B. Application Of *Cronic* To The Rare Case In Which Attorney Default Leads To An "Adversarial Breakdown" Is Both Necessary and Sensible.

1. Petitioner's bottom-line is this: The Court should use this occasion to adopt the rule that "bad lawyering, no matter how bad" is always to be evaluated under *Strickland* – and particularly *Strickland*'s prejudice prong – rather than under *Cronic*. *See* Pet. Br. at 37. That would be a mistake.

For the great majority of ineffective assistance claims, *Strickland* does provides a sensible and workable standard. In most attorney performance cases, *Strickland*'s prejudice prong, requiring the defendant to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," 466 U.S. at 694, functions just as it should, separating out those attorney errors that undermine confidence in the fairness and outcome of the proceeding from those that do not. *See id.* at 686, 692; *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986) (ineffective assistance inquiry identifies cases in which "counsel's unprofessional errors so upset the adversarial balance . . . that the trial was rendered unfair and the verdict rendered suspect.").

But there are a few exceptional cases of attorney performance – or, more accurately, attorney *non*performance – in which application of *Strickland*'s prejudice prong could lead to results inconsistent with the Sixth Amendment principles that underlie *Strickland* itself. These cases involve only the most egregious forms of attorney nonperformance and abdication: the attorney who sleeps through substantial portions of his client's trial, for instance, *see Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc), petition for cert. pending, No. 01-495, or the attorney who repeatedly expresses his contempt for his client, effectively acting as a second prosecutor, *see Rickman v. Bell*, 131 F.3d 1150 (6th

Cir. 1997). In these very limited circumstances, the lower courts have discovered, *Strickland*'s measure of prejudice may fail to capture an attorney default so serious that it threatens the integrity of the trial process.

Part of the problem is that the fundamental nature of an attorney's failure in those situations may make it difficult to pinpoint prejudice in *Strickland*'s outcome-determinative terms. When counsel entirely abdicates his adversarial role, the reviewing court must both conjure what might have been the hypothetical defense and then consider whether it might have made a difference – a doubly speculative undertaking. *See Burdine*, 262 F.3d at 355 ("We presume prejudice because experience tells us that an occurrence presents both a high probability of prejudice and a difficulty of 'proving it' it any finite sense.").[5]

The other part of the problem is that in the narrow class of cases containing egregious attorney nonperformance, the question asked by *Strickland*'s prejudice prong – is there a likely effect on the outcome? – is incomplete. The Sixth Amendment is concerned with the reliability of outcomes, to be sure. *See Strickland*, 466 U.S. at 692. But it is equally concerned with the justness of outcomes and with the fairness and legitimacy of the procedures that produce them. *See id.* at 686-87; *Williams*, 529 U.S. at 391; *Kimmelman*, 477 U.S. at 374. So if defense counsel completely defaults on his responsibility to perform as an advocate, then it is not enough to satisfy the Sixth Amendment that the evidence of defendant's guilt may seem overwhelming, *see Rickman*, 131

[5] This problem may be especially acute in the penalty phase of capital proceedings. Because the sentencer enjoys the discretion to consider *any* evidence that he or she believes to be mitigating, it is particularly difficult to assess the effect of mitigating arguments never made. *See, e.g.*, Bright, *supra*, at 1865-66; *cf. Satterwhite v. Texas*, 486 U.S. 249, 258 (1988) (harmless error analysis in penalty phase context "may be more difficult because of the discretion that is given to the sentencer").

F.3d at 1156, or that the defendant may have difficulty proving that the outcome of his trial would have been different had his lawyer been awake, *see Burdine*, 262 F.3d at 357 (Jolly and Smith, JJ, dissenting). Regardless of whether there is a demonstrable effect on outcome for *Strickland* purposes, counsel's abdication means that there can be no confidence in the fundamental fairness of the proceedings. *See Cronic*, 466 U.S. at 655-56 (right to counsel assures fairness of trial itself).

It is not surprising that *Strickland*'s prejudice inquiry is ill-equipped to take account of exceptional cases involving total attorney default. As discussed above, *Strickland* was never intended to govern such cases. *Cronic* was, and in the rare instances in which the lower courts invoke it, the *Cronic* standard operates to protect the "fairness, and thus the legitimacy of our adversary process," *Kimmelman*, 477 U.S. at 374. *See Rickman*, 131 F.3d at 1160; *Burdine*, 262 F.3d at 346. When "bad lawyering" is the equivalent of no lawyering at all, *Cronic* serves a vital function. This Court should reject petitioner's proposed curtailment of the *Cronic* standard and instead reaffirm its application to such cases.

2. The United States takes a slightly different position than petitioner. Though it appears to agree with the State in principle, *see* U.S. Br. at 12-14, it is willing to admit that there may be some cases involving attorney performance to which *Strickland* should not apply, *see id.* at 21-22. So the rule the United States would have the Court adopt seems to be this: so long as the government has not interfered with counsel's representation, *Strickland* governs – except when counsel is absent, *id.* at 12; when counsel represents conflicting interests, *id.* at 13; perhaps (though not necessarily) when counsel is "sleeping (and therefore unconscious)," *id.* at 22; when counsel "fail[s] to make any comment" at a sentencing hearing, *Tucker v. Day*, 969 F.2d 155, 159 (5th Cir. 1992), U.S. Br. 21; when counsel fails to object to a directed ver-

dict, *Harding v. Davis*, 878 F.2d 1341, 1344 (11th Cir. 1989), U.S. Br. at 21; and when counsel's strategy is to decline to put on any defense at trial, *see Martin v. Rose*, 744 F.2d 1245, 1250 (6th Cir. 1984), U.S. Br. at 21.

A more straightforward approach might be to acknowledge the general principle that ties together these otherwise *ad hoc* "exceptions." That principle comes directly from *Cronic*: When counsel ceases to function as the state's adversary in any meaningful sense, it is as though counsel is absent, and no further showing of harm is needed to identify a Sixth Amendment violation. 466 U.S. at 653-55. When "the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Id.* at 656-57.

The problem for the United States is that the principle, once articulated, applies as readily to respondent's case as to any the United States cites approvingly in its brief. It is not clear, for instance, what line the United States would draw between a case like this one, in which counsel fails to make any affirmative case for life to counter the prosecution's case for death, and a case like *Harding*, *supra*, which turns critically on counsel's failure to object to a single motion – albeit one for directed verdict – by the prosecution, 878 F.2d at 1344-45; or between this case and one like *Martin*, *supra*, in which counsel's decision to "abandon all attempts to defend his client at trial in favor of reversal on appeal" was supported by what even the reversing court conceded was a "superficially persuasive" strategic rationale, 744 F.2d at 1250. Sensible lines can be drawn in this area, but not in a vacuum. Once the *Cronic* principle is used as the reference point – and the nature of the default in this case properly understood, *see supra* at 8-10 – respondent's case joins the same category as the other "*Strickland* exceptions" noted by the United States.

3. Finally, pointing to what it describes as the policy justifications behind *Cronic* and *Strickland*, the United States argues that in cases in which the government has not interfered with counsel's performance, *Cronic* should apply only if "the court can easily identify the denial of the right to counsel and prejudice is so likely that a case-by-case examination of prejudice is not worth the effort." U.S. Br. at 22; *see also* Pet. Br. at 36 (making similar argument). That argument is unavailing for two reasons.

First, it elevates what is a supporting rationale in *Cronic* and *Strickland* to the level of first principle. Neither *Strickland* nor *Cronic* is a case chiefly about judicial efficiency. Though in both cases the Court demonstrates appropriate concern for matters of practicality, *see Cronic*, 466 U.S. at 658; *Strickland*, 466 U.S. at 692, in neither does it suggest that the ineffective assistance inquiry can be reduced to a cost-benefit analysis.

In any event, this case – like most cases involving adversarial breakdown under *Cronic* – meets the practical criteria held out by the United States. It is true that many attorney deficiencies are difficult for reviewing courts to identify and impossible to "define[] with sufficient precision to inform defense attorneys correctly just what conduct to avoid." *Strickland*, 466 U.S. at 693. This case is different. There is nothing difficult about identifying the defect in counsel's performance here. The Sixth Circuit was not required to pore over the record to determine that counsel, by failing to present mitigating evidence at sentencing and waiving closing argument, passed up any opportunity to respond to the State's case for death with his own case for life. Nor is it likely that this kind of nonperformance could ever be justified by legitimate strategic considerations of the sort discussed in *Strickland*. 466 U.S. at 689-90. Indeed, counsel for respondent never offered *any* strategic justification, no matter how implausible, for the *combined* failure to present

evidence and make a closing argument that is at the heart of this case.[6]

And from the perspective of defense attorneys, the complete failure to present any case for a life sentence in response to the State's case for death can be defined quite succinctly as "conduct to [be] avoid[]ed" by counsel. *Strickland*, *supra*. When it is feasible, as is the case here, this Court has not hesitated to describe and enforce certain minimal standards of representation. *See Flores-Ortega*, 528 U.S. at 480 (counsel has a "constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal . . . or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing"). That enterprise is enormously helpful to NACDL in its efforts to maintain and defend professional standards of conduct.

As for prejudice, it bears repeating that the United States' position – that *Cronic* should apply only when *Strickland* prejudice is likely to be provable – would defeat the purpose of *Cronic*: to capture the rare case of egregious attorney de-

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[6] As for the *post hoc* justification offered by counsel for his failure to make a closing argument – his concern about the oratorical prowess of the lead prosecutor – NACDL adopts the responses of the Sixth Circuit and respondent. *See* Pet. App. 35-36. NACDL adds only its hope that this case will serve to confirm that professional standards do not countenance forgoing closing argument at a capital sentencing proceeding for fear of being outmatched in the declamatory arts. *See Tools for the Ultimate Trial*, *supra*, at 14.98 ("Because the state cannot properly reserve any significant point not already discussed by the parties for its summation, it is foolhardy to waive final argument in order to deny the prosecutor the opportunity to fire a closing salvo. If you have done a good job, you will be able to make an effective argument that can both give the jury some reason not to kill the defendant and take the sting out of the prosecutor's summation.").

fault for which the *Strickland* prejudice inquiry was never intended and is ill-suited. *See supra* at 16-17. But accepting *arguendo* the United States' premise, the fact remains that an actual breakdown of the adversarial system is indeed likely to prove prejudicial in *Strickland* terms. In most cases, it can fairly be said that counsel's failure to subject the state's case to any meaningful adversarial testing is reasonably likely to affect the outcome of a proceeding. This case illustrates the point. Counsel's failure to respond to the State's case for death with an argument for life must have affected the jury's view of the aggravating evidence as well as of the case in mitigation, and may well have created the affirmative misimpression that the state's plea for death was unanswerable. *See* Pet. App. 36; *supra* at 8-9. This is precisely the kind of "pervasive effect" that *Strickland* itself identifies as especially likely to be prejudicial in *Strickland* terms. *See* 466 U.S. at 695-96 (describing errors that "have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture").

It is not surprising, then, that lower courts applying *Strickland* to similar, though not entirely comparable, failures of advocacy at capital sentencing – no presentation of mitigating evidence combined with substandard closing argument –find both deficient performance and prejudice under the *Strickland* standard. *See Smith v. Stewart*, 140 F.3d 1263 (9th Cir. 1998); *Hall v. Washington*, 106 F.3d 742 (7th Cir. 1997); *Kubat v. Thieret*, 867 F.2d 351 (7th Cir. 1989). If, as the United States urges, *Cronic* sensibly applies when the outcome likely would be the same under the more time- and record-intensive *Strickland* analysis, then *Cronic* sensibly applies to this case and cases like it.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

RICKY BELL, WARDEN,

Petitioner,

—v.—

GARY BRADFORD CONE,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF TENNESSEE, IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Tennessee is one of its statewide affiliates. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. In this case, the United States Court of Appeals for the Sixth Circuit held that the prisoner was denied effective assistance of counsel at the sentencing phase of his criminal prosecution in state court. The state and its *amici* challenge not only the circuit court's conclusion, but its methodology. Accordingly, this case raises issues of fundamental importance to the ACLU and its members.

In order to focus our presentation, we limit this brief to the arguments advanced by one of the state's *amici*, the Criminal Justice Legal Foundation (CJLF), regarding proper procedure under 28 U.S.C. §2254(d), enacted as part of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).

STATEMENT OF THE CASE

We adopt the prisoner's statement of the case. That statement explains that the implementation of §2254(d) was not decisive below and thus is not the focus of the prisoner's brief.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The circuit court below applied §2254(d) in the proper way. That court simply followed the path this Court marked in *Williams v. Taylor*, 529 U.S. 362 (2000), and subsequent cases and concluded that §2254(d) did not foreclose habeas relief in this instance.

The state's *amicus*, the Criminal Justice Legal Foundation, argues, however, that the circuit court failed to follow a particular procedural program that the CJLF contends is required by §2254(d). The CJLF asks this Court to adopt a novel interpretation of §2254(d), not contemplated by *Williams* and more recent precedents. That course of action is unwarranted. The Court need do no more lawmaking in this case than what is required to decide whether the judgment below should be sustained.

Specifically, the CJLF asks the Court to mandate that district courts entertaining habeas petitions must: (1) bypass the question whether a prisoner's claim is meritorious and go immediately to the question whether, assuming that a previous state court decision was erroneous, §2254(d) nonetheless bars federal habeas relief; and (2) treat a prior state court decision as not "unreasonable" if the question whether the prisoner's claim was meritorious was "reasonably debatable." Neither of those two things is consistent with this Court's analysis in *Williams*.

It is not only unnecessary, but unwise to do what the CJLF advocates. The CJLF would have this Court establish procedures for all cases in the abstract, without benefit of vetting in a series of lower court cases in which issues are actually raised and thoroughly explored. The circuit court below did not so much as mention the issues that other circuits have just begun to address. The CJLF's proposed program would risk mistakes that may be avoided if the Court proceeds in the conventional, case-by-case manner.

In any event, the CJLF's plan is fundamentally unsound. It conflicts with §2254(d) and with other habeas statutes that AEDPA left in place, as well as with this Court's precedents in *Williams* and other cases. Section 2254(d) is not addressed to a federal court's authority and responsibility to adjudicate the merits of a prisoner's claim. Instead, this statute speaks only to the availability of habeas corpus relief in a case in which a federal court decides that a previous state court decision on the merits was erroneous.

The CJLF's proposed definition of "unreasonable" state decisions is also unjustified. The Court explained in *Williams* that the standard that Congress actually enacted is familiar to lawyers and judges and will serve perfectly well without creative judicial exegesis.

The CJLF argues specifically that the Court should hold that a state court decision was "reasonable" if the correct disposition of a prisoner's claim was "susceptible to debate among reasonable minds" at the time. That formulation would risk reviving the very "overlay" on §2254(d) that this Court squarely rejected in *Williams*.

The CJLF also argues that the Court should rely on definitions of "reasonableness" in cases elaborating qualified immunity. That, too, would be a mistake. This Court has always kept the standards for determining an executive officer's personal liability for damages separate from the standards for determining the validity of a prisoner's incarceration. The underlying rationales for the Court's decisions in the two contexts are quite different.

ARGUMENT

I. SECTION 2254(d) DOES NOT RESTRICT A FEDERAL COURT'S AUTHORITY AND RESPONSIBILITY TO ADJUDICATE THE MERITS OF FEDERAL CLAIMS

The circuit court below proceeded to judgment in precisely the way this Court prescribed in its authoritative interpretation of §2254(d) in *Williams v. Taylor*, 529 U.S. 362. That court had no need to reach any §2254(d) issues not plainly resolved by *Williams*, let alone any occasion to anticipate and resolve in the abstract questions that might conceivably require attention in the future.

In Question No. 1 in its petition for *certiorari*, the state suggested that the circuit court applied a "de novo standard of review," which placed its analysis in "conflict" with *Williams*. That characterization was misleading. In fact, the circuit court used the term "de novo" only to describe its review of the district court's disposition of the prisoner's claims. *Cone v. Bell*, 243 F.3d 961, 966 (6th Cir. 2001). The circuit court did not propose that, despite *Williams*, it was free to dispose of the prisoner's habeas petition according to the standards that existed before AEDPA was enacted.

The CJLF argues that the circuit court misapplied §2254(d). By the CJLF's account, the circuit court should have assumed hypothetically that the Tennessee Court of Criminal Appeals' decision was erroneous and should have gone immediately to the question whether it was "contrary to" clearly established law or "unreasonable." That reading of §2254(d) cannot be sustained.

The CJLF's construction is flatly inconsistent with the text of §2254(d), as well as the text of §2254(a), which AEDPA preserves intact. Section 2254(d) does not restrict

a district court's authority and responsibility to address prisoner's claims in the first instance, but rather limits the *relief* a district court can award, if and when it concludes that a state court reached an erroneous judgment. By its literal terms, §2254(d) specifies circumstances in which "[a]n application for a writ of habeas corpus . . . shall not be *granted* . . . ." (emphasis added).

A district court's duty to address the merits of claims is established by §2254(a), which states that a district court "shall entertain an application" for the writ if the petitioner is in "custody" in violation of federal law. AEDPA preserves both those familiar provisions untouched.

In *Williams* and other cases, this Court recognized that §2254(d) is exclusively a remedial measure. The Court explained that "§2254(d)(1) places a new constraint on the power of a federal court to *grant* . . . a writ of habeas corpus." 529 U.S. at 412 (opinion of the Court by O'Connor, J.)(emphasis added). That has always been this Court's understanding: §2254(d) is concerned with relief and relief alone. Addressing its own work in habeas cases in the first AEDPA case, *Felker v. Turpin*, 518 U.S. 651 (1996), the Court could have been no more explicit:

> Title I of the Act has changed the standards governing our consideration of habeas petitions *by imposing new requirements for the granting of relief* to state prisoners. Our authority *to grant habeas relief* to state prisoners is limited by §2254, which specifies the conditions under which *relief* may be granted . . . . Several sections of the Act impose *new requirements for the granting of relief* under this section, and they therefore inform our authority *to grant such relief* as well.

Id. at 662 (emphasis added).

This Court has itself considered the merits of prisoners' claims before turning, if necessary, to the question whether §2254(d) bars habeas relief. This was essentially the pattern in *Williams*, *Weeks v. Angelone*, 528 U.S. 225 (2000), and *Ramdass v. Angelone*, 530 U.S. 156 (2000).

The Court explained in *Williams* that the "threshold" question is whether a prisoner applying for a writ of habeas corpus "seeks to apply a rule that was clearly established at the time his state-court conviction became final." 529 U.S. at 390 (opinion of Stevens, J.).[2] That, of course, is the choice-of-law question associated with *Teague v. Lane*, 489 U.S. 288 (1989). The choice-of-law issue must come first for the obvious reason that it identifies the law the habeas court will apply when it turns to the merits of a prisoner's claim.[3] *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). Justice O'Connor explained in *Williams* that a rule was "clearly established" for habeas purposes if it could be found in this Court's contemporaneous "holdings." *Williams*, 529 U.S. at 412 (opinion for the Court by O'Connor, J.). The answer to the threshold choice-of-law question in *Williams* was easy. This Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), was the controlling contemporaneous holding.

The Court next explained in *Williams* that the prisoner was entitled to "relief" if the Virginia Supreme Court's decision was either "contrary to" or "involved an unreasonable application of" that "established law" (*Strickland*). 529 U.S. at 391 (opinion of Stevens, J.). We do not contend that the Court then simply applied *Strickland* to the facts in *Williams* as though it were deciding whether the Virginia Supreme Court's decision was correct at the time it was rendered. Having just referred to the standards for habeas relief under §2254(d), the Court plainly had those standards in mind as it turned to the events in state court. Yet we hasten to point out that the Court set about its appraisal of the state supreme court's work by deciding that the trial judge had invoked the correct legal rule (*Strickland*). The Court then explained that the state supreme court had chosen the wrong rule by contrasting the supreme court's behavior to that of the trial judge. 529 U.S. at 394. Similarly, the Court decided that the trial judge had reached the correct result when it applied *Strickland* to the facts, and that the state supreme court had reached an unreasonable decision by contrast. *Id.* at 395.[4]

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[2] This analysis in Part III of the opinion by Justice Stevens had the support of Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer. *See id.* at 413 (opinion of O'Connor, J.)(endorsing Part III); *id.* at 399 n.* (noting that Justice Kennedy joined Justice O'Connor's opinion in its entirety).

[3] The CJLF argues that the choice-of-law question is resolved first to avoid an unconstitutional advisory opinion. CJLF Brief at 10. In *Teague*, however, this Court expressed concern about advisory opinions in an entirely different context: If this Court announced a novel principle of constitutional law in a case and failed to give the individual in that case the benefit of that rule, *then* the Court's statement of the "new rule" would appear advisory. 489 U.S. at 315-16. The Court did not say that a federal habeas court's determination of the rule of law reflected in this Court's contemporaneous holdings would be advisory. This Court has made it clear that a federal judicial decision on an analytically prior question is part and parcel of proper Article III adjudication. *See, e.g.*, pp.9-10 *infra* (noting that federal courts routinely determine the merits of claims before passing on to the question whether an offending officer can be made to pay compensatory damages).

[4] To its credit, the CJLF makes no attempt to argue that this Court followed the CJLF's formula for §2254(d) cases in *Williams*. That would not be a fair characterization of the way the Court proceeded. The Court noted that the circuit court below had assumed without deciding that the petitioner had been denied effective assistance of counsel in violation of the Sixth Amendment. 529 U.S. at 374 n.6 (opinion of Stevens, J.). But the Court itself made no such assumption.

The CJLF recognizes that in *Weeks* this Court plainly addressed the merits of a prisoner's claim as the first order of business. CJLF Brief at 12. In that case, the Court held that the state court had reached the correct result with respect to the prisoner's claim. That holding, of course, was dispositive. *Weeks*, 528 U.S. at 237. Similarly, in *Ramdass*, the Court explained that "the Constitution [did] not require" the jury instruction the prisoner requested. *Ramdass*, 530 U.S. at 178. There, too, the Court based its result on a determination of the merits.

To be sure, the Court appeared to proceed differently in addressing the first of the two claims in *Penry v. Johnson*, 532 U.S. 782, 121 S.Ct. 1910 (2000)(*Penry II*). In that case, the prisoner first claimed that the admission of a psychiatric report violated his right against self-incrimination. This Court disposed of that claim not by deciding whether it was valid in light of the pertinent holding of this Court, *Estelle v. Smith*, 451 U.S. 454 (1981), but rather by concluding that the Texas Court of Criminal Appeals decision rejecting it was neither "contrary to" *Estelle* nor an "unreasonable application" of that holding. 121 S.Ct. at 1919. This said, it must also be noted that *before* the Court held that §2254(d) would not permit habeas relief, the Court discussed the merits of the Fifth Amendment claim at some length. In that discussion, the Court noted four ways in which the prisoner's case was distinguishable from *Estelle*. *Id.* Plainly, then, the Court did not skip blithely by the merits of the claim and rest in a conclusory way on §2254(d). Instead, the Court seriously engaged the claim, identified its weaknesses, and *then*, in light of those weaknesses, held that the state court decision rejecting the claim was sufficient to foreclose a federal habeas remedy.

With respect to the second claim in *Penry*, the Court focused even more extensively on the merits before turning to

§2254(d). The prisoner claimed that a supplemental instruction to the jury at the sentencing phase of his trial failed to satisfy another of this Court's prior holdings, *Penry v. Lynaugh*, 492 U.S. 302 (1989)(*Penry I*). The Court explored that claim in detail, and in so doing squarely determined that the supplemental instruction was constitutionally inadequate under *Penry I*. 121 S.Ct. at 1922 (stating that "[t]he supplemental instruction therefore provided an inadequate vehicle for the jury to make a reasoned moral response to Penry's mitigating evidence"). Having itself decided that the supplemental instruction did not satisfy *Penry I*, the Court thereafter said: "*Thus*, to the extent the Texas Court of Criminal Appeals [concluded otherwise], that determination was objectively unreasonable." *Id.* at 1924 (emphasis added). Clearly, then, the Court was in a position to decide whether §2254(d) permitted habeas relief only after it first decided that the prisoner's second claim was valid in light of the holding that supplied the applicable rule of decision.

The CJLF makes far too much of *Penry II*. Even though the Court did plainly rest on §2254(d) in that instance, once to deny habeas relief and once to award it, the Court just as plainly examined the merits of the prisoner's two claims before announcing its judgments regarding the availability of a habeas remedy. Certainly, *Penry II* cannot be cited as an illustration of the kind of formulaic program for §2254(d) that the CJLF proposes.

The procedure in *Weeks* and *Ramdass* is logical, practical, and efficient. Once a federal court has identified the rule of law that is applicable to a claim, it makes sense to move next to the question whether, in light of that rule, the prisoner's federal rights were violated in previous state proceedings. If the court decides that a previous state court judgment was correct at the time, the case ends then and there. If the court decides that the state court decision was

erroneous, it will be in a good position to decide whether that erroneous judgment was "also" unreasonable. *Williams*, 529 U.S. at 411 (opinion of O'Connor, J.). Proceeding from one question to the next in a logical, linear fashion fosters clear analysis and exposition. If, in the end, the federal court determines that §2254(d) permits habeas relief, the court will be able to explain why -- by contrasting what the state court did with what it should have done. That, after all, was precisely this Court's approach in *Williams*.

The Court has recognized these advantages in qualified immunity cases, where district courts are explicitly instructed to address the merits of plaintiffs' claims before turning to the question whether an award of damages can be made. *E.g.*, *Wilson v. Layne*, 526 U.S. 603, 609 (1999); *County of Sacramento v. Lewis*, 523 U.S. 833, 841-42 n.5 (1998). The CJLF dismisses this point on the ground that in the immunity context there is typically no state court decision on the merits and, accordingly, a federal court decision may be needed to clarify whether a defendant officer actually violated a plaintiff's rights. Moreover, according to the CJLF, a federal habeas court judgment on the merits of a federal claim is without value even as a precedent for future reference. CJLF Brief at 13.

The CJLF's argument in this vein is overdrawn on both points. This Court has required district courts to treat the merits first in immunity cases not merely to establish precedents for executive officers to follow, but also to achieve a better brand of adjudication. A federal court's assessment of a federal claim is a step toward clarity, even if it is not the final step. *See County of Sacramento v. Lewis*, 523 U.S. at 841 n.5 (explaining that "even a finding of qualified immunity requires some determination about the state of constitutional law at the time the officer acted"). It is true that under §2254(d) only this Court's holdings form "clearly established Federal law." Yet inferior court decisions are

not for that reason without value. They guide state and lower federal courts alike regarding what this Court's decisions mean. In addition, they inform this Court's consideration of the content of federal rights.

Recognizing, perhaps, that its proposed construction of §2254(d) fights the text of the statute, the precedents, and sound policy, the CJLF insists that the Court should lay all that aside and impose the CJLF program in order to further Congress' underlying "purposes." This Court commonly locates statutory purposes by drawing rational inferences from the text of a statute itself. That, indeed, is precisely what the Court did in *Williams* with respect to this very provision of AEDPA. The Court read §2254(d) to be addressed to habeas *relief* not only because its text plainly conveys that meaning, but also because that text indicates that its purpose is to restrict the habeas remedy, not habeas adjudication.[5]

The purpose readily apparent from the text of §2254(d) is that this new provision prevents a federal habeas court from ordering a prisoner released merely because the federal court disagrees with the judgment of a previous state court on the proper disposition of a federal claim. State courts and inferior federal courts are co-equals within a single judicial system. They are not answerable to each other, but only to this Court. Under this provision, a federal court can grant relief only if a previous state court judgment was "contrary to" or involved an "unreasonable application of" the precedents of this Court that were in place at the time.

Departing from both the text of §2254(d) and *Williams*, the CJLF seeks the "purposes" of the statute in legislative

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[5] The CJLF makes no attempt to rely on rational inferences from the text here. The obvious reason is that the text of §2254(d) defies the very purposes that the CJLF wants the Court to identify.

history. We, too, have urged the Court to consult informative legislative materials as an aid to interpreting AEDPA. In particular, we have argued that the sequence of bills and amendments that preceded §2254(d) illuminates the political compromise that finally won passage in the Senate.[6] The CJLF's argument here, however, is extremely weak by comparison.

The CJLF insists that speeches on the Senate floor suggest two objectives that warrant a construction of §2254(d) that goes beyond what this Court said in *Williams*: (1) the "purpose" to "expedite the resolution of habeas corpus petitions;" and (2) the "purpose" to "protect correct state-court judgments from erroneous nullification." CJLF Brief at 6-7. We have no doubt that those two concerns figured in the mix of motivations, hopes, desires, and expectations of many members of Congress who supported AEDPA. But it is patently unsound to propose, as CJLF *does* propose, that those "purposes" buttress the CJLF's program for §2254(d).

Many features of AEDPA were plainly meant to streamline and expedite the federal habeas process. This particular provision, §2254(d), was not one of them. The filing deadline sections of the bill were popular, because they were presented as a means to speed up the process without compromising the federal courts' traditional ability to grant habeas relief when prisoners established meritorious claims. By contrast, §2254(d) engendered considerably more opposition because it did *not* promise procedural efficiency and *did* limit federal court power to award habeas relief.[7]

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[6] Brief *Amicus Curiae* of the ACLU, in *Williams v. Taylor*, No. 98-8384, at 22-29.

[7] Senator Biden introduced an amendment that would have deleted this provision from the larger bill. In support of that amendment, he explained that he, too, wished to place "time limits" on habeas and other (continued...)

The CJLF contends that §2254(d) was understood to promise faster process, because district courts would skip over the merits of claims and deal only with the availability of habeas relief. That is a reach, to put it mildly. The CJLF cites not one line in reliable legislative materials indicating that anyone thought or said that this provision was in the bill for that reason. Quite the contrary, §2254(d) was deviant in what was otherwise a package of procedural reforms meant to eliminate delays and procedural snarls.

Certainly, the CJLF's quotations from Senator Hatch do not support the CJLF's understanding of §2254(d). Moreover, in other statements Senator Hatch expressly urged the Senate to adopt §2254(d) because it would preserve the federal courts' authority and responsibility to adjudicate the merits of federal claims. For example, at the height of his debate with Senator Biden over the meaning of §2254(d), Senator Hatch said this:

> [The standard now in §2254(d)] is a wholly appropriate standard. It enables the Federal courts to *overturn* State court positions that clearly contravene Federal law. *Indeed, this standard essentially gives the Federal court the authority to review de novo whether the State court decided the claim in contravention of Federal law.*

142 Cong. Rec. S7848 (daily ed. April 17, 1996)(emphasis added).

We do not contend that this second statement clearly establishes that Senator Hatch contemplated that district courts

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[7] (...continued)
"limits on successive petitions." Yet he objected to this provision because it was not a procedural reform of that order. 141 Cong. Rec. S7840-41 (daily ed. June 7, 1995).

would first determine the merits of claims and then turn to the question of relief under §2254(d). We do think, however, that this statement lends itself to that reading.

We acknowledge that §2254(d) was meant to prevent federal habeas courts from nullifying "correct" state court decisions neither "contrary to" federal law nor "unreasonable." That purpose can easily be inferred from its text, without resort to floor speeches. With respect to this second "purpose," however, the CJLF's argument is weaker still. A federal court scarcely nullifies a "correct" state court decision merely by determining whether it rests on constitutional error. If "nullification" ever occurs, it can only be at the stage a federal court awards habeas relief, thus freeing a prisoner despite his conviction in state court. We agree that §2254(d) limits habeas relief. By reaffirming that well settled point, the CJLF scarcely makes its case that §2254(d) limits something quite different: a district court's antecedent authority and responsibility to determine the merits of claims.

II. SECTION 2254(d) ALLOWS A FEDERAL COURT TO GRANT HABEAS CORPUS RELIEF IF A PREVIOUS STATE COURT DECISION ON THE MERITS WAS UNREASONABLE

Section 2254(d) permits the award of habeas relief if the state court decision on which the state relies for a prisoner's custody "involved an unreasonable application" of clearly established law. Over many years prior to 1996, Congress considered an assortment of bills containing different standards. In the end, Congress settled on this one. The CJLF argues, however, that a "reasonableness" standard is inadequate and urges this Court to establish "some further definition" to guide the lower courts. But, in *Williams*, this

Court has already declined to place any such judicial gloss on §2254(d).

There is nothing all so imprecise about the standard the statute expressly employs. The Court acknowledged in *Williams* that "[t]he term 'unreasonable' is no doubt difficult to define." 529 U.S. at 410 (opinion of O'Connor, J.). Yet that term is "common" in the "legal world" and "federal judges are familiar with its meaning." *Id.* It will serve in this context as well as any potential alternative and without the kind of "further definition" the CJLF proposes. That was the very point of the discussion in *Williams*, which gave this provision in §2254(d) its authoritative construction. Moreover, the Court will necessarily elaborate on what counts as "unreasonable" as it applies §2254(d) to a series of cases.

CJLF cites a few circuit court efforts to specify what should count as an "unreasonable application" of federal law. CJLF Brief at 20-22. We recognize that those circuits have struggled with this new statute in this early period. Yet in time the lower courts will develop greater facility in cases under §2254(d). There will be opportunity enough to address circuit court estimates of this statutory standard if and when cases arise in which those estimates make a difference. Certainly, there is no need for the Court to anticipate continuing disagreements among the circuits and to try to resolve those disagreements, in the abstract, in this case.

The CJLF urges the Court to declare that a state court decision cannot be said to have been "unreasonable" within the meaning of §2254(d) if the proper disposition of a claim was "susceptible to debate among reasonable minds." CJLF Brief at 22. The CJLF draws that particular verbal formulation from one of the earliest *Teague* cases, *Butler v. McKellar*, 494 U.S. 407, 415 (1990). In addition, the CJLF leans on precedents in the qualified immunity context.

CJLF Brief at 21, citing *Saucier v. Katz*, 533 U.S. 194 (2001).

If the Court were inclined to specify the meaning of the term "unreasonable" in §2254(d), it could not accept the proposed definition put forth by the CJLF without effectively rejecting the teaching of *Williams*. By arguing that federal habeas relief is barred unless a state court reached a decision that "reasonable jurists would all agree" was "unreasonable," the state in *Williams*, like the CJLF here, echoed the *Butler* formulation. But that, of course, is precisely the "overlay" on §2254(d) that this Court squarely disavowed in *Williams*. 529 U.S. at 409 (opinion of O'Connor, J.).

The CJLF's analogy to the official immunity cases is equally unavailing. Justice Stevens explicitly rejected that analogy in *Williams*. *Id.* at 380 n.12 (opinion of Stevens, J.). If Justice O'Connor had meant to rely on it, she certainly would have done so expressly. In our own brief in *Williams*, we sketched the reasons why it would be a mistake, in habeas cases governed by §2254(d), to rely on cases determining "reasonableness" for qualified immunity purposes. Brief *Amicus Curiae* of the ACLU in *Williams v. Taylor*, No. 98-8384, at 19-21.

This Court has always drawn a clear distinction between qualified immunity and habeas corpus. Different considerations drive the two bodies of law. In the qualified immunity cases, the Court has addressed "special . . . federal policy concerns" relating to civil suits for damages. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995). In habeas corpus, by contrast, the Court has attended to "certain" other "special concerns" touching the availability of collateral relief from state judgments. *Id.*

The considerations the Court has taken into account in qualified immunity cases do not apply in habeas corpus cases. Here, the state officers in question are judges who

have the resources, time, and professional credentials to make reasoned judgments. State judges are not put on trial. Nor are they exposed to personal liability for their judicial decisions. Indeed, they are not formally involved. The dispute with which the federal district court is concerned is between the petitioner and the custodian, who defends the prisoner's detention on the basis of what state judges have done and thus places their work under examination only indirectly. *Coleman v. Thompson*, 501 U.S. 722, 730 (1991). Precedents on "reasonableness" in the qualified-immunity context cannot sensibly be used in habeas cases to shield state judicial judgments from (deflected) federal examination. *Cf. Ryder v. United States*, 515 U.S. 177, 185 (1995).

A construction of §2254(d)(1) that borrows the special "reasonableness" standard from the qualified immunity context would also conflict with this Court's interpretation of 42 U.S.C. §1983 -- another statute with which this new provision governing habeas relief must be reconciled. This Court has labored long and hard to make habeas corpus and §1983 actions compatible. In *Heck v. Humphrey*, 512 U.S. 477 (1994), for example, the Court held that a §1983 suit for damages is unavailable to a prisoner whose claim goes to the validity of a criminal judgment -- unless the prisoner first undermines that judgment by some other means, typically a habeas corpus action.

The scenario the Court envisions is that a plaintiff will initially seek and obtain a favorable decision in habeas (in which case the "reasonableness" test applicable in qualified immunity cases will play no role). Then (and only then), the plaintiff will be entitled to sue the offending state executive officer for damages (in which case that officer *will* be entitled to defend on the ground that his or her behavior was "reasonable" within the meaning of this Court's precedents on immunity). If §2254(d)(1) were construed to incorporate

the qualified immunity standard into the plaintiff's habeas action in the first instance, *Heck* would no longer make sense. An issue that *Heck* reserved for the subsequent §1983 suit would be jammed into the previous habeas proceeding -- making the §1983 suit's treatment of it superfluous.[8]

[8] No such conflict is created, of course, by Congress' decision in §2254(d) to authorize federal habeas courts to adjudicate the merits of prisoners' claims before turning to the question of habeas relief. *See* Point I, *supra*. In that respect, Congress has made the order of issues in habeas similar to the order in qualified immunity cases. And Congress has done that for reasons that apply to both kinds of cases. For the reasons described in the text, however, it would not make sense to use the same understanding of "reasonableness" in both contexts. Congress has wisely avoided that mistake. With respect to the substantive standard applied to state behavior (as opposed to the order in which federal courts decide issues), the habeas and qualified immunity contexts are entirely different. And a standard developed for the one need not be appropriate for the other.

CONCLUSION

For the reasons stated above, the Court should not construe §2254(d) either to restrict federal courts' authority and responsibility to adjudicate the merits of federal claims or to import an understanding of "reasonableness" established for qualified immunity cases into the habeas context.

Respectfully submitted,

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